Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ENPLANAR, INC., E.J.A., INC., DRAGON LIMITED, INC., V. KEELER & CO, INC., AND JEAN H. TURNER, TRUSTEE OF V. KEELER, INC.

Petitioners,

VERSUS

JOHN MARSH, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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15 8 PM

QUESTIONS PRESENTED FOR REVIEW

Was injunctive relief against the unlawful suspension of the 8(a) program and against the non-protected procurement of previously setaside projects precluded by 15 U.S.C. § 634(b)(1), and if so, were plaintiffs' rights to equal protection of the laws thereby violated by a denial to them, as minority contractors, of the right to seek that injunctive relief that is available to any majority contractor, simply because the plaintiffs were participants in the 8a set-aside program and were designated as disadvantaged minority business enterprises?

Can the subject matter jurisdiction of a district court, established by a claim against the United States for injunctive relief, be lost by a judicial failure or refusal to act that renders injunctive relief impossible and makes monetary damages the only equitable relief available?

Can the jurisdiction of the Federal Claims Court be exclusive when plaintiffs have alleged that the Army violated their

constitutional rights, where the relief available from the Federal Claims Court is insufficient to protect the plaintiffs' rights or to vindicate constitutional guarantees, where Army discrimination has made plaintiffs unable to compete with majority businesses, and adequate relief, equitable in nature, is available only in the district courts?

Once Congress has established a set-aside program for minority contractors and the Army implemented this program to their benefit, may the Army discontinue or suspend the program without notice to participating minority businesses or withdraw projects from setaside on false pretexts, thus depriving those MBEs of a property right conferred by Congress, without violating the Due Process Clause of the Fifth Amendment to the Constitution?

Was it proper for the district court, contrary to its local rules providing, *inter alia*, for a written motion, notice, and a statement of uncontested material facts, to grant summary

judgment based on material first raised in the body of a supplemental memorandum when the time for such a motion had passed, without notice to the non-moving party, when new factual issues were raised thereby, and when discovery had been stayed? Were the consequences of this inability to respond compounded by the holding on appeal that defenses to the summary judgment, first urged in the court of appeal because of such lack of notice, had been waived? Did this effectively rob the non-moving parties of the opportunity to respond and thus deprive those parties of their interest in the suit without constitutionally required due process?

Did the actions of the transferee court and the court of appeal in disposing of the Keeler case by dismissal for lack of subject matter jurisdiction err in failing to consider the issues specifically not considered in the *Enplanar* case, in not permitting discovery previously stayed, and in not permitting an

amendment which more sharply focused the legal contentions resulting from the limited discovery permitted?

PARTIES TO THIS PROCEEDING

Petitioners/Plaintiffs:

Nancy Marinovic and Enplanar, Inc., Elmer Jones and E.J.A., Inc., Yu Chiao Lo and Dragon Limited, Inc., Vernes Keeler and V. Keeler & Co, Inc., Jean H. Turner, Trustee of V. Keeler, Inc.

Counsel for Petitioners:

Louis R. Koerner, Jr.

Defendants/Respondents:

John Marsh, Secretary of the Army of the United States; Robert W. Page As Army Assistant Secretary, Civil Works; Lieutenant General Henry Hatch, In His Official Capacity As Chief of Engineers; Colonel Richard B. Gorski, In His Official Capacity As District Engineer, U.S. Army; Colonel Stephenson W. Page, Individually and in His Official Capacity As District Engineer, U.S. Army; United States Army; United States Army Corps of Engineers; Susan Engeleiter, Administrator, Small Business Administration; United States Small Business Administration, Major Robert Green, Individually

Counsel for Respondents:

Attorneys for the Corps of Engineers: Claude T. Bagley, Division Counsel, LMRV Division, Randy Florent, Joseph Towers, and Gwenn Nachmann, New Orleans District, Henry Black, Vicksburg District, Augustus Smith, AUSA;

Attorney for the Small Business Administration: Alan J. Wells;

Attorneys for Respondents as a group: Lisa J. Stark, Dennis J. Dimsey, Mary Beth Martin, Timothy Karaskiewicz, and Eneid Francis.

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The opinion of the United Stat4es Court of Appeal in *Enplanar v. Marsh*, Fifth Circuit, 91-3897, January 19, 1994, is reported at 11 F.3d 1284 (*Enplanar*) A-1- A-41

The opinion of the United States Court of Appeal in *Enplanar v. Marsh*, Fifth Circuit, 93-7633, June 2, 1994, is not reported (*Keeler*) A-42-A-51

The order of the United States Court of Appeals for the Fifth Circuit, denying petition for rehearing and suggestion for rehearing *En Banc* in *Enplanar*, is reported at 19 F.3d 17 (5th Cir. March 14, 1994) A-96

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered its first opinion (*Enplanar*) on January 19, 1994 and denied the application for rehearing on March 14, 1994 and rendered its second opinion (*Keeler*) on June 2, 1994.

STATUTES INVOLVED

FRCP Rule 56(f)

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

15 USCA Sec. 634, Small Business Administration - General powers

(b) *Powers of Administrator*

In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may--

(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property;

15 USCA Sec. 637. *Additional powers*

(a) Procurement contracts; subcontracts to disadvantaged small business concerns; performance bonds; contract negotiations; definitions; eligibility; determinations; publication; recruitment; construction subcontracts; annual estimates; Indian tribes

(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate--

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and such procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator. Not later than 5 days from the date the Administration is notified of a procurement officer's adverse decision, the Administration may notify the contracting officer of the intent to appeal such adverse decision, and within 15 days of such date the Administrator shall file a written request for a reconsideration of the adverse decision with the Secretary of the department or agency head. For the purposes of this subparagraph, a procurement officer's adverse

decision includes a decision not to make available for award pursuant to this subsection a particular procurement requirement or the failure to agree on the terms and conditions of a contract to be awarded noncompetitively under the authority of this subsection. Upon receipt of the notice of intent to appeal, the Secretary of the department or the agency head shall suspend further action regarding the procurement until a written decision on the Administrator's request for reconsideration has been issued by such Secretary or agency head, unless such officer makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a reconsideration of the adverse decision. If the Administrator's request for reconsideration is denied, the Secretary of the department or agency head shall specify the reasons why the selected firm was determined to be incapable to perform the procurement requirement, and the findings supporting such determination, which shall be made a part of the contract file for the requirement. A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price;

(B) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or

processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts;

(C) to make an award to a small business concern owned and controlled by socially and economically disadvantaged individuals which has completed its period of Program Participation as prescribed by section 636(j)(15) of this title, if--

(i) the contract will be awarded as a result of an offer (including price) submitted in response to a published solicitation relating to a competition conducted pursuant to subparagraph (D); and

(ii) the prospective contract awardee was a Program Participant eligible for award of the contract on the date specified for receipt of offers contained in the contract solicitation; and

(D)(i) A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if--

(I) there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price, and

(II) the anticipated award price of the contract (including options) will exceed $5,000,000 in the case of a contract opportunity

assigned a standard industrial classification code for manufacturing and $3,000,000 (including options) in the case of all other contract opportunities.

42 USCA Sec. 1981, Equal rights under the law

(a) *Statement of equal rights*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) *Definition*

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

This case involves important issues of fundamental fairness and substantive and procedural due process in the administration of the minority setaside program established by Congress under 15 U.S.C. § 637(a) and commonly known as the 8(a) Program and in access to the courts by minority contractors justly aggrieved by arbitrary and discriminatory government action.

Here, significant rights of four minority contractors in the New Orleans and Vicksburg Corps of Engineers Districts were suspended without notice or an opportunity to be heard. Projects previously setaside were withdrawn from the 8(a) program for false and pretextual purposes because of an attempt, kept secret from the 8(a) contractors, by one agency, the Corps of Engineers, to force the Small Business Administration to deviate from its regulations by performing

economic impact studies on non-reoccurring projects[1] and because of an unwarranted fear of personal liability on the part of their contracting officers.[2]

When administrative attempts, through meetings, letters, and telephone calls, failed to cause the resumption of the 8(a) program or prevent non-protected procurement of setaside projects, the contractors filed a complaint in the district court seeking to mandate the resumption of the 8(a) program and the restoration, through injunctive and declaratory relief, of the setaside projects (R. 187). Although the 8(a) program was subsequently "voluntarily" resumed, injunctive relief was opposed by the government and subsequently denied to the contractors by the district court because of the involvement of

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[1] 13 C.F.R. § 124.309(c)

[2] Exhibit 1 to deposition of Kenneth Enclade; Exhibits 1-4 of original complaint.

the SBA. Two previously setaside projects, Southwest Pass and Cotton Meade Cap Out, were publicly bid, awarded to, and completed by non-minority contractors.

After injunctive relief was denied as unavailable and moot, the Government moved for summary judgment against all claims of all contractors. On motion of the government, the contractors' attempted discovery of the SBA was prevented and discovery of the Vicksburg Corps curtailed.[3]

Plaintiffs timely responded to the government's motion for summary judgment and sought Rule 56(f) relief, supported by affidavits, because of the stay of discovery and the inability to obtain discovery of the SBA and of Vicksburg engineering and procurement personnel. Moreover, plaintiffs obtained, through a FOIA request, an SBA document that contended that the failure of negotiation for and subsequent withdrawal from the

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[3] A-54.

8(a) program of the Cotton Meade Cap Out Project was done in bad faith and for discriminatory reasons[4] and consistent with the contention of V. Keeler & Co., Inc. ("Keeler"), the beneficiary 8(a) contractor, that the "reason" for withdrawal, a change in scope, was false and that the falsity was demonstrated by the later public bid under specifications identical to those of the project as previously setaside.[5]

The limited discovery of the Vicksburg Corps demonstrated that the summary judgment affidavit submitted under the signature of Major Robert Green, the contracting officer, was either entirely false or made without personal knowledge.[6] During that deposition and that of Col. Stephenson Page, it became clear that the Vicksburg Corps was

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[4] R. 337-39.

[5] Exhibit 8 to original complaint.

[6] Exhibit 1 to defendants' memorandum in support of their motion for change of venue, affidavit of Robert Green. See footnotes 20-21.

retaliating against and refusing to deal with the contractors (particularly Keeler, who had sought a substitute setaside project) because of the filing of the lawsuit and in violation of their right to redress of grievances and access to the courts.[7]

On the basis of these depositions, the adverse award of Cotton Meade Cap Out and Southwest Pass, and the "voluntary" resumption of the 8(a) Program by the Corps of Engineers, plaintiffs filed an amended complaint asserting, *inter alia*, a *Bivens* action against Stephenson and Page and converting injunctive and declaratory claims of Keeler and EJA to requests for damages on account of their discriminatory treatment and the withdrawal and adverse award of the setaside projects despite pending injunctive and declaratory relief.[8]

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[7] *See* Depositions of Page and Stephenson quoted at footnote 25.

[8] R. 283, see also footnote 25.

The government sought to dismiss Page and Stephenson for lack of proper service, which was mooted by subsequent and admittedly proper service.

After the time set by the district court for filing memoranda had passed,[9] the government submitted a "Supplemental Memorandum," which, in violation of the local rules of the Eastern District of Louisiana and the order of the district court, asserted, in the body of the memorandum only,

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[9] On April 30, 1991 (Dkt. 60, R. 244), the district court continued the trial date and the pre-trial conference in a minute entry which stated: "IT IS FURTHER ORDERED that the motions which have been set for April 24, 1991 are TAKEN UNDER SUBMISSION" and "IT IS FURTHER ORDERED that the parties shall submit all additional memoranda on the issues under submission not later than MONDAY, MAY 13, 1991, at 5:00p.m." [Emphasis added.]R. 668-695.

entirely new grounds for summary judgment and was directed against the new counts of the amended complaint.

Plaintiffs, not being alerted by the caption of the memorandum, by non-compliance with the local rules,[10] and the time for responding having passed, did not file any additional opposition.

Summary judgment was granted against all plaintiffs other than Keeler (A-67), whose claims were transferred to the Southern District of Mississippi, because the district court felt

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[10] Rule 2.04E Submission of Motions. All motions . . . shall be in writing. Each motion and its accompanying documents shall be filed in duplicate . . . If the Court decides not to hear oral argument in a specific case involved counsel will be timely notified.

Rule 2.02E Setting Motion for Hearing. Counsel filing a motion shall, at the time of filing, notice it for hearing within a reasonable time thereafter. Unless otherwise ordered by a Judge in the particular case, motions must be filed not later than the fifteenth day preceding the notice hearing date and at least fifteen days actual notice of hearing must be given to opposing counsel . . ."

Rule 2.09E Motions for Summary Judgment. Every motion for summary judgment shall be accompanied by a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

that there was sufficient evidence of discrimination against Keeler to avoid summary judgment (A-67). Plaintiffs, still not alerted to the dramatic but *sotto voce* amendment of the motion for summary judgment, complained in their motion for reconsideration that the district court had granted summary judgment *sua sponte*.

The decision in *Enplanar v. Marsh*, 11 F.3d 1284 (5th Cir. 1994) (*Enplanar)*, which was rendered eighteen months after oral argument, affirmed and specifically refused to consider the numerous issues raised by Keeler, stating that they were better considered by the transferee court (A-1, A-14., n. 7). At that time, however, the Southern District of Mississippi had already rendered its adverse judgment and had not considered any of the issues deferred in the first Enplanar decision .[11]

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[11] A-89, See Memorandum Order of November 4, 1992, A-72.

In the Southern District of Mississippi, the government again requested a stay of discovery in the Keeler case and filed a motion to dismiss for lack of subject matter jurisdiction, contending that the jurisdiction of the Federal Claims Court was exclusive. Keeler, by then having been put out of business, responded by filing a Second Amended Complaint in which it substantially expanded its claims arising out the discriminatory failure to award Cotton Meade Cap Out, the withdrawal from the 8(a) program, and the adverse award of the project and asserted a *Bivens* claim against the procurement personnel at Vicksburg who had been guilty of the discriminatory conduct and against the government officials who had given the advice which had resulted in the suspension of the program.

Months later, but prior to the *Enplanar* decision, the district court granted the motion to dismiss the complaint for lack of subject matter jurisdiction, refused to permit further

discovery, and denied the motion to file the Second Amended Complaint (A-89). This was also timely appealed

The Fifth Circuit, with a panel completely different than that of *Enplanar* failed to consider any of the issues deferred in the *Enplanar* decision and rendered an unpublished decision (*Keeler*, A-42, June 2, 1994) affirming the dismissal of the complaint for lack of subject matter jurisdiction and the refusal to permit an amendment or discovery.

This application is from both of these decisions.

THE INTERRUPTION AND SUSPENSION OF THE 8(A) PROGRAM

Plaintiffs, contractors certified as disadvantaged under the 8(a) program, acted with the SBA in the 8(a) Program in negotiating for and performing construction contracts with and for the Lower Mississippi River Valley Division ("LMVD") of the Corps, primarily but not exclusively with the Corps' New Orleans and Vicksburg Districts.

EJA was the incumbent on the Southwest Pass project,[12] but this project was withdrawn from the program in April, 1990 and just after the *Fordice* decision.[13] Also at that time, Keeler had been selected for and was in the final stage of negotiations with the Vicksburg Corps for award of Cotton Meade Cap Out.

At the time of the October, 1990 8(a) program suspension (including setaside designation, negotiation, and contract award), Enplanar had been selected for two Architectural & Engineering contracts, whose award and implementation was

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[12] EJA expected that project to be continued in the 8(a) Program.

> Inasmuch as the following projects are historically 8(a) projects, please accept this as this office's official request to maintain these projects in the 8(a) program after the current contracts expire.

(Letter from Janita R. Stewart, SBA New Orleans, 1/2/91, Hatcher 8-9, Dkt. 84). *See also* F.A.R. 19.804(a)(5).

[13] *Fordice Construction Co., et al. v. Marsh,* 773 F.Supp. 867 (S.D. Miss. 1990)

delayed by the suspension. Referral to the Corps and award of 8(a) contracts to Dragon, then performing a levee contract for the New Orleans Corps, was delayed.

THE FACTS AS REVEALED TO PLAINTIFFS

Unknown to the contractors and beginning in March and April of 1990 (the *Fordice* decision) and continuing through at least January of 1991, the administration of the 8(a) Program by the Corps in New Orleans and Vicksburg was adversely impacted by perceived constitutional problems. Legal opinions from the Department of Justice, Army and Corps Headquarters, and from the LMVD and Vicksburg District, authored by "Various Unknown Employees of the Department of Justice and of the Corps of Engineers"[14] and after *Fordice*, so

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[14] Not provided to plaintiffs, despite request.

suggested[15] the unconstitutionality of the 8(a) Program that New Orleans and Vicksburg Corps contracting officers were caused to fear that they would be subject to suits from non-minority contractors for constitutional torts for operating in accordance with applicable laws and regulations.

Beginning after the *Fordice* decision, the New Orleans and Vicksburg Corps, acting on instructions from LMVD, attempted to force SBA to make economic impact determinations on future and pending setaside projects, including Cotton Meade Cap-Out, [16] then in negotiation with Keeler, even though no regulation required that such determinations be made on new and non-recurring projects.

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[15] Unreasonably, see *Valley Construction Co. v. Marsh*, 984 F.2d 133, 134-35 (5th Cir. 1993)

[16] Solicitation No. DACW38-89-R-0029, Cotton Meade Cap-Out - Mile 121.0 to Mile 110.0, Red River Waterway - Rapides Parish, Louisiana.

Rather, "Adverse impact does not apply to 'new' requirements." 13 C.F.R. § 124.309(c).[17]

As of the filing of the original complaint, the 8(a) Program was admittedly not in effect in the New Orleans and Vicksburg Corps Districts, but had been suspended, placed on "hold", or "indefinitely postponed." "[N]egotiations on new 8(a) awards were held in abeyance from early November 1990 to late January of 1991."[18]

All plaintiffs alleged and filed supporting affidavits as to the damage caused by the suspension of the 8(a) Program and by actions of the New Orleans and Vicksburg Corps. Although Judge Mentz acknowledged the strength of the evidence of bad faith involving withdrawal of Cotton Meade,[19] Southwest Pass was also withdrawn and there was substantial delay in the

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[17] *See Valley II,* 984 F.2d at 135 and note 5 rejecting *Fordice*.

[18] Brief of Appellee in 91-3837 at 14.

[19] Order and Reasons, A-55 at A-64.

award of two A & E contracts to Enplanar and delay in all Corps contract referrals to SBA for the following year.

THE COTTON MEADE CAP-OUT PROJECT

Keeler had been designated by the SBA and the Vicksburg Corps to negotiate for and, if negotiations were concluded in accordance with the applicable regulations, to receive an award of a contract to perform the Cotton Meade Cap-Out project. Keeler had previously filed suit against the Vicksburg Corps, had protested several disallowance of its bids on large Red River Projects, and was a minority contractor and a new entrant in the hotly contested Red River construction market.[20]

In fact, Vicksburg's Major Robert Green, based on information furnished by other the "Various Unknown officers and employees of the Vicksburg Corps", determined that the delays in prior negotiations and the uncertainties and other

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[20] Deposition of Robert Green at p. 6.

problems engendered by the *Fordice* case meant that a successful negotiation with Keeler could not be accomplished in time to meet the timetable mandated by Congress for completion of this phase of Red River Work.[21] .

On September 8, 1990, the SBA notified Keeler that the Vicksburg Corps had given written notification that the Cotton Meade Cap-Out project had been changed in scope and would be redesigned, so that a decision had been made by the Corps, for the convenience of the government, to withdraw the project from the 8(a) program. At Keeler's request, the local SBA office made a protest, later revealed to plaintiffs in a response to a FOIA request.

The contended change in scope was admittedly missing in the initial public solicitation in December of 1990. Rather the

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[21] Deposition of Robert Green at p. 41.

change in scope was used as a pretext to justify the withdrawal of the project from the 8(a) Program.

Despite the pendency of this litigation and the request for an order prohibiting the award of the Cotton Meade contract other than under the 8(a) program, defendants persisted in the public procurement so that the project was awarded to Luhr Brothers, a non-minority contractor. The work on the project has now been completed, thus making an award to Keeler no longer possible.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

A writ of certiorari should be granted in this case for the following reasons:

(1) The conclusion reached below that injunctive relief is precluded by 15 U.S.C. § 634(b)(1) is conceded in the opinion at n. 7 (A-14) to be contrary to the opinions of other circuit courts of appeal in *Cavalier Clothes, Inc. v. United States*, 810 F.2d 1108, 1111-1112 (Fed.Cir.1987) and *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1056 (1st Cir. 1987)

(2) The result below, that subject matter jurisdiction of the district court, established by a claim against the United States for injunctive relief, was lost by a judicial failure or refusal to act that rendered injunctive relief impossible and made monetary damages the only equitable relief available is contrary to the decision of this Court in *Bowen v. Massachussetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988)

(3) The holding that the jurisdiction of the Federal Claims Court is exclusive for plaintiffs' remaining claims establishes a conflict between the circuits and is inconsistent with Congressional intent in establishing the 8(a) Program. *Please see Mar v. Kleppe,* 520 F.2d 867, 869-71 (10th Cir. 1975); *Munoz v. Small Business Admin.*, 644 F.2d 1361, 1364 (9th Cir. 1981); *Falls Riverway Realty, Inc. v. Niagara Falls,* 754 F.2d 49, 55-56 (2d Cir. 1985); *ATC Petroleum Corp. v. Sanders,* 860 F.2d 1104, 1113 n. 2 (D.C. Cir. 1988); *C.H. Sanders Co. v. BHAP Housing Dev. Fund Co.*, 903 F.2d 114, 118-20 (2d Cir. 1990); *Western Securities Co. v. Derwinski,* 937 F.2d 1276, 1280-81 (7th Cir. 1991); and *TransOhio Savings Bank v. Direct, Office of Thrift Supervision,* 967 F.2d 598, 605-614 (D.C. Cir. 1992).

(4) Once Congress has established a set-aside program for minority contractors and the Army implemented this program to their benefit, the Army may not change the terms of participation, discontinue, or suspend the program without notice to participating minority businesses or

withdraw projects from setaside on false pretexts, thus depriving those MBEs of a property right conferred by Congress, without violating the Due Process Clause of the Fifth Amendment to the Constitution.

(5) The court of appeal departed from accepted and usual course of judicial proceedings in its failure to enforce the standards for the use of the summary judgment procedure and sanctioned such a departure by the district court, in granting summary judgment without adequate discovery, without notice, and in violation of the district court's local rules mandating notice, so as to require review by this Court.

(6) The decision below represents important questions of federal law as to the availability of the district courts to award injunctive in minority or small business bidding situations and the jurisdiction of the Federal Claims Court as to which this Court has not rendered a decision. The court of appeal decision conflicts with the rule in other circuits.

ARGUMENT AND AUTHORITIES

I. AVAILABILITY OF INJUNCTIVE RELIEF TO MINORITY CONTRACTORS

In all circuits other than the Fifth Circuit, the fact that the SBA, against whom no injunctive relief was requested, may be

a defendant for declaratory relief would constitute no bar to the injunctive relief requested by plaintiff, minority contractors. *Ulstein Marine, Ltd. v. United States*, 833 F.2d 1052, 1056-57 (1st Cir. 1987), *Cavalier Clothes v. United States*, 810 F.2d 1008, 1112 (Fed. Cir. 1987); *Oklahoma Aerotronics v. United States*, 661 F.2d 976, 977 (D.C. Cir. 1981); *Related Indus. v. United States*, 2 Ct. Cl. 517, 522 (1983).

No consideration was given by the court of appeal to whether or not pre-award relief as to particular contracts was available and no careful analysis of either the legislative history of § 634(b)(1) or the effect of the Federal Court Improvement Act of 1982. *Compare* the comment of *Cavalier Clothes*, 810 F.2d at 1112:

> The Federal Courts Improvement Acts of 1982 specifically empowers the Claims Court generally to grant injunctive relief on contract claims brought before the contract is awarded. 28 U.S.C. § 1491(a)(3) (1982). That recent expression of Congress' purpose necessarily gives a new focus to the bare words of Sec. 634(b)(1) with respect to such contract claims.

The narrow reading of *Cavalier Clothes* in *Enplanar* as restricted solely to the Claims Court is unjustified as the *Cavalier Clothes* court also concluded that there was nothing in the legislative history that is the "basis for any inference that Congress intended to exclude the SBA when it later authorized injunctive relief against government agencies and departments generally on pre-award contract claims." [*Id.* at 1112.] *See Mar v. Kleppe*, 520 F.2d 867, 869-71 (10th Cir. 1975)

The consequence of the decisions below is that participants in the 8(a) Program in the Fifth Circuit will be discriminatorily "less equal" than non-8(a) participants or bidders. Majority candidates for procurement can obtain injunctive relief and agency suspension of illegal procurement because the SBA would not be a "necessary party" to the litigation, *e.g.*, *Hayes International Corp. v. McLucas*, 509 F.2d 247, 257-58 (5th Cir. 1975), whereas 8(a) participants

may not unless they are financially able and willing to go to the Claims Court.

II. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF KEELER AND EJA FOR WITHDRAWAL OF 8(a) PROJECTS

The *Enplanar* decision relegates EJA's claims for denial of injunctive relief and subsequently damages for Southwest Pass to the Claims Court,[22] as does the *Keeler* decision for Cotton Meade Cap Out.[23] However, the jurisdiction of the Claims Court is not exclusive. Rather, it is a method of obtaining federal court subject matter jurisdiction and a waiver of sovereign immunity. Keeler and EJA, who had an alternative method of obtaining jurisdiction and waiver of sovereign immunity, properly sued in the district court and their claims

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[22] A-14, n. 7.

[23] A-42, at A-46.

were within the limits of that statutory grant of jurisdiction and the relief authorized.

This result, was characterized in *Munoz v. Small Business Admin.*, 644 F.2d 1361, 1364 (9th Cir. 1981)as "bizarre."

> Moreover, forcing small businesses throughout the nation to file claims against the SBA for more than $10,000 in the Court of Claims in Washington, D.C. is, without doubt, at odds with the considerations prompting the enactment of the Small Business Act, 15 U.S.C. § 631. . . .
>
> To impose upon small business the burdensome expense of pressing their claims in Washington, D.C., when a nearby United States District Court is available to handle the litigation would frustrate Congress's declared policy that the government should counsel, assist, and protect the interests of small business concerns. The dismissal of the SBA for lack of subject matter jurisdiction is reversed.

Please see Mar v. Kleppe, 520 F.2d 867, 869-71 (10th Cir. 1975); *United Penn Bank v. U.S.A. Small Business Admin.*, 603 F.Supp. 531, 532-33 (M.D. Pa. 1984) (rejecting exclusivity of the Tucker Act); *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49, 55-56 (2d Cir. 1985); *ATC Petroleum Corp. v.*

Sanders, 860 F.2d 1104, 1113 n. 2 (D.C. Cir. 1988) (equitable lien); *C.H. Sanders Co. v. BHAP Housing Dev. Fund Co.,* 903 F.2d 114, 118-20 (2d Cir. 1990); *Western Securities Co. v. Derwinski,* 937 F.2d 1276, 1280-81 (7th Cir. 1991) (Veterans Administration, concurrent jurisdiction with the Claims Court under 28 U.S.C. § 1331); *Jackson Square Assoc. v. U.S. Dept. of HUD,* 797 F.Supp. 242, 244-47 (W.D. N.Y. 1992) (finding district court jurisdiction over an agency under § 1331); *TransOhio Savings Bank v. Direct, Office of Thrift Supervision,* 967 F.2d 598, 605-614 (D.C. Cir. 1992).

A & S Council Oil Co. v. Saiki, 799 F.Supp. 1221 (D.C. D.C. 1992) contains an extensive discussion of waiver of sovereign immunity permitting suits against the SBA at pages 1227-1229 and a similarly thorough discussion of subject matter jurisdiction at 1229-1332. *Please also see Eubanks v. United States,* 25 Cl.Ct. 131, 139-41 (1992), finding a lack of jurisdiction in the Claims Court for similar claims, and

Northern Cheyenne Tribe v. Lujan, 804 F.Supp. 1281, 1287-88 (D. Mont. 1991) reviewing the circumstances, such as here, that would preclude Claim Court jurisdiction. *Please also see Claims Court at the Crossroads*, 40 Cath. U. L. Rev. 517, 529-32 (1991) discussing the recent effective narrowing of the jurisdiction of the Claims Court.

Moreover, the district court never lost the jurisdiction that it had at the beginning of the case. It continued to have "the power to issue a mandatory injunction to restore the situation to the status quo when a party, with notice of impending injunction proceedings, completes or performs the action sought to be withdrawn." *F. Alderette General Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983). The only available remedies are equitable in nature, thus permitting the district courts to maintain jurisdiction. *Bowen v. Massachussetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988).

III. LACK OF PROCEDURAL DUE PROCESS

The procedures utilized in the courts below violated basic procedural due process and caused the unjust and unjustified result that the contractors were rendered worse off than if they had not sought redress for grievances.

In *Enplanar*, the dramatic revelations in the discovered documents concerning the interagency dispute causing withdrawal of setaside projects, in the SBA contention of bad faith on the part of the Vicksburg Corps, and in the depositions of Major Green and Col. Stephenson of the pretextual nature of the Cotton Meade Cap Out withdrawal and the refusal to deal with the contractors, were not allowed to be used to prevent premature summary judgment on behalf of contractors other than Keeler. Even as to Keeler, this dramatic evidence did not cause the second amended complaint to be filed, did not result

in additional discovery,[24] and did not prevent the dismissal of the claims for withdrawal of Cotton Meade Cap Out.

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[24] Discovery is vital to due process particularly when motions for summary judgment are being considered. For instance, the Third Circuit has said that an "incomplete state of discovery alone should have precluded summary judgment on the merits." *Miller v. Beneficial Management Corp*, 977 F.2d 834, 845 (3d Cir. 1992). The *Miller* court noted that the grant of summary judgment after the nonmoving party has made known to the court that discovery is incomplete is not a sound exercise of discretion. *Id.* at 846. Other circuits have found discovery to be equally essential to procedural due process: "Summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Burnside-Ott Aviation Training Center v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). The D.C. Circuit has held that the grant of summary judgment is inappropriate when coupled with a denial of nonmoving party's discovery requests that were targeted at information relevant to its claims. *Wilderness Society v. Griles*, 824

In the *Enplanar* case, there was no actual notice of the motion for summary judgment on the First Amended Complaint and consequently no actual opportunity to respond. Relief has been granted when the nonmoving party does not have either the ten day notice or an opportunity to respond. *Reese v. Sparks,* 760 F.2d 64, 66 (3d Cir.1985) (peculiar sequence of events giving nonmoving party no further

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F.2d 4, 17 (D.C. Cir. 1987). *See also* WSB-TV v. Lee, 842 F.2d 1266, 1269 (11th Cir. 1988) (The "common denominator" of the three recent Supreme Court cases is that court's "caveat that summary judgment may only be decided upon an adequate record.") In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, n. 11. and 2514 (1986) this Court cautioned "against granting summary judgment prematurely", and that

> the nonmoving party's obligation to respond to a motion for summary judgment is qualified by "Rule 56(f)'s provision that summary judgment be refused where the nonmoving party had not had the opportunity to discover information that is essential to his opposition.

opportunity to oppose a grant of summary judgment against an amended complaint); See, *Atchison, T. & S. F. R. Co. v. Buell,* 480 U.S. 557, 568 n. 15, 107 S.Ct. 1410, 1417 n. 15, 94 L.Ed.2d 563 (1987); compare *Pioneer Investment Services Co. v. Brunswich Associates Limited Partnership,* ____ U.S. ___, 113 S.Ct. ____, ___ L.Ed.2d _____ (1993) (relief granted from the failure to comply with a court-ordered filing deadline because of "excusable neglect" caused by the failure of the counsel for the party moving for Rule 60(b) relief to understand the import of the notice.)

Particularly egregious was summary judgment in favor of Major Green and Colonel Stephenson based on a hearsay and self-serving Army document not provided in discovery and appended to the affidavit of Jonathan Hatcher. Although this supposed Army policy not to talk to contractors in litigation was used by the district court and the *Enplanar* panel to justify a refusal to permit self marketing, the actual testimony of these

two Vicksburg officials did not advert to this policy and was much more dramatically retaliatory.[25]

Plaintiffs immediately notified opposing counsel of this well-recognized violation of the First and Fifth Amendments by means of retaliation for filing suit and sent citations of the leading authorities.[26] *Please see Jaffee v. Barber*, 689 F.2d

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[25] When Major Green was asked whether he would see Keeler for other projects, he said no, "I don't think so. Not while he's in litigation against us. . . . I don't think it's appropriate." Dep. 3/27/91 at 84-85. Col. Page stated that he would not talk to Keeler during the litigation because he "personally would feel uncomfortable sitting down trying to negotiate or talk about contracts while litigation was going on, as contracting officer." Deep. 3/27/91 at 24. Green stated (page 83) that it was not a policy of the Vicksburg Corps that they not speak to plaintiffs while litigation was ongoing. The decision to prevent self-marketing was purely personal.

[26] *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986); *Irizarry v. Quiros*, 722 F.2d 869 (1st Cir. 1983); *Kush*

640, 643 (7th Cir. 1982) (A claim that "a federal official, acting under color of federal law, intentionally refused to perform an act, even a discretionary one, solely on the basis of a complainant's race states a cause of action under 42 U.S.C. § 1981); *Hyland v. Wonder*, 972 F.2d 1129, 1134 (9th Cir. 1992) ("[P]ublic officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech.")

In further support of the contention that this constituted an actionable constitutional violation that was not properly disposed of by summary judgment, please also see *Middleton v. Reynolds Metal Co.*, 963 F.2d 881, 882 (6th Cir. 1992) ("As a threshold matter, we not that summary judgment is likely to be inappropriate in cases where the issues involve intent."

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v. Rutledge, 460 U.S. 719, 103 S.Ct. 1483 (1983); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976).

Moreover, "Qualified immunity does not shield against equitable claims." *Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785, 788 (11th Cir. 1992).

Given these circumstances, the finding of waiver of arguments by the *Enplanar* court for failing to make them in the district court (on account of lack of notice) constitutes a deviation from the settled precedent of this Court and of courts of appeal other than the Fifth Circuit that additional arguments may be made on appeal when the arguments are based in the existing record. *Hormel v. Helvering.*, 313 U.S. 552, 557, 61 S.Ct. 719, 721 (1941); *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *United States v. Bess*, 357 U.S. 51, 54-55, 78 S.Ct. 1054, 1057 (1958) (fact in the record). This is particularly true where summary judgment was granted below so that the moving party will not be prejudiced by consideration of a new legal theory. *Roofing & Sheet Metal Servs., Inc. v. LaQuinta Motor Inns., Inc.*, 689 F.2d

982, 991 (11th Cir. 1982); *Fane v. Edenfield,* 945 F.2d 1514, 1519, n. 11 (11th Cir. 1991), *aff'd on other grounds*, ___ U.S. ___, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("Consideration of legal arguments not presented to the district court is especially appropriate on appeal from summary judgment."); *Seniority Research Group v. Chrysler Motor Corp.,* 976 F.2d 1185, 1187-88 (8th Cir. 1992) (inconsistent with substantial justice not to consider new argument).

In like manner, the failure of the *Keeler* panel to consider the numerous matters deferred to it by the *Enplanar* panel[27] and not considered by the district court and its disposition of the appeal by means of an unpublished decision was error when the legal issues were not routine and the cursory nature of the decision obscured errors that would have been apparent had there been the full consideration merited by the serious issues

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[27] A-1, A-14, n. 7.

deferred by the *Enplanar* panel and the serious evidence of discrimination against Keeler found by Judge Mentz to have justified denial of summary judgment.[28]

The proffered Second Amended Complaint, tendered long before the *Enplanar* decision and based on the grudging discovery of the Vicksburg Corps and the LMVD, provided additional jurisdictional grounds in the assertion of constitutional violations against those who recommended the

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[28] The opinion of the Louisiana Supreme Court in *Roberts v. Sewerage and Water Board*, 634 So.2d 341, 348-49 (La. 1994) is instructive. There the intermediate court of appeals was criticized for choosing to decide a case without a published opinion without carefully following its own rules, because the issue was "obviously not well settled or lacking of public importance." This was because, with a published decision, "the court may have reached a different and more correct decision." '[A]n expanded treatment would have been more apt to expose its flaws in reasoning,

suspension of the 8(a) program and caused the discriminatory withdrawal of the Cotton Meade Cap Out Project. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264 (1978) (Fifth Amendment violations); *Butz v. Economou*, 438 U.S. 478, 505, 98 S.Ct. 2894, 2910 (1978) and dissent of Rehnquist at 438 U.S. at 527, 98 S.Ct. at 2921; *Carey v. Phipus*, 435 U.S. 245, 267, 98 S.Ct. 1042, 1054 (1978). The failure to permit the filing of the Second Amended Complaint, particularly on the casuistic and inaccurate grounds found by the court of appeal,[29] constitutes a deviation from the liberal policy of amendment and of disposition on the merits mandated by this Court.

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[29] A-42, A-50. Please note that the motion had been sent in and that an additional copy was sent with the motion for reconsideration.

IV. PROPERTY RIGHTS IN THE 8(a) PROGRAM

None of the contractors received any advance notice of the attempt of the Corps to alter the SBA's regulation that did not require an economic impact study on non-reoccurring projects.[30] None of the contractors received notice that the Corps has suspended its setaside, negotiation for, or award of new contracts. None of the contractors received notice that the Corps, for reasons of potential liability of their contracting officers, was withdrawing projects from setaside and was giving untrue and pretextual reasons for the withdrawal.

The actions of defendants meant that plaintiffs, each a participant with a fixed and limited term of participation, suffered a loss of and were precluded from full 8(a) Program participation in Corps projects during the period in which the 8(a) Program was adversely affected. The "chilling effect" and

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[30] Exhibit 24 to Hatcher's Deposition, Dkt. 84, April 24, 1990 letter to SBA.

adverse impact on the operation of the 8(a) Program therefore caused this term of participation to be effectively diminished on account of the actions of the defendants in failing to fully and properly administer the program and in imposing additional requirements as a prerequisite of award of particular projects within the 8(a) Program.

To the extent that participation in the 8(a) program generates property rights, which, despite the *Enplanar* decision seems well established in this Court,[31] plaintiffs were constitutionally entitled to a pre-deprivation right to be heard[32] that was admittedly not provided.

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[31] *See, e.g., Zimmerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983 (1990).

[32] "Property denotes a broad range of interests that are secured by existing rules or understandings . . . Thus, reasonable expectations in a particular status may attain protected property status based on a state law, regulation, policy, or a mutually explicit understanding a governmental body puts forth, and such an interest may be implied

CONCLUSION

Plaintiffs used the expectations resulting from their 8(a) certification in order to plan their businesses, hire employees, secure lines of credit. In short, they did everything that any

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from words or conduct." *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1544 (11th Cir. 1994). Please also see *Atkins v. Parker*, 105 S.Ct. 2520, 2528 (1985) (food stamps and welfare benefits); *Darlak v. Bobear*, 814 F.2d 1055, 1061-62 (5th Cir. 1987) (staff privileges); *Mathes v. Hornbarger*, 821 F.2d 439, 441-42 (7th Cir. 1987) (Veterans benefits); *Nasierowski Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 897 (6th Cir. 1991) (property interest in zoning classification because plaintiff had taken steps to develop the property); *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992) (volunteer status); *Madera Irr. Dist. v. Hancock*, 985 F.2d 1397, 1402 (9th Cir. 1993) (vested property right); *Bailey v. Secretary of U.S. Dept. of Labor*, 810 F. Supp. 261, 262-63 (D. Alaska) (withholding of payments due, preliminary injunction granted).

competent non-minority contractor would do in order to efficiently and profitably perform the projects that were setaside and promised to them. However, the worthy goals mandated by Congress were interrupted and thwarted by secret interagency disputes and false constitutional dilemmas that resulted in program suspension and project withdrawal that gave plaintiffs no opportunity to be heard.

The lack of procedural due process was compounded by the failure of the courts below to act. Injunctive relief was denied as unavailable, discovery was almost entirely prevented, summary judgment granted without notice or a reasonable opportunity to point out factual issues and defects that were later considered waived or appeal or deferred, as to Keeler, by sending them to another court in which they were not considered and Keeler's case dismissed without additional discovery or an opportunity to amend to be heard, if at all, by the Court of Federal Claims. Both panels of the Fifth Circuit

parsed justice in a most technical and unfair way that seems intended to close this unseemly chapter without redress and as an example to all those who feel that equal justice and minority rights are fundamental to our system of government.

Certiorari should be granted. The decisions below should be vacated and reversed and the cases remanded for full discovery and for trial.

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APPENDIX

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United States Court of Appeals
Fifth Circuit.

No. 91-3837

ENPLANAR, INC., V. Keeler & Company, Inc. and Dragon Limited, Inc., Plaintiffs-Appellants,

v.

John MARSH, In His Official Capacity as Secretary of the Army of the United States, et al., Defendants-Appellees.

Jan. 19, 1994.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges and WERLEIN,* District Judge.

GARWOOD, Circuit Judge:

This case involves the grant of summary judgment against a suit for unspecified damages from a three-month suspension of a discretionary minority set-aside program. E.J.A., Inc. (EJA); Enplanar, Inc. (Enplanar); Dragon Limited, Inc. (Dragon); and V. Keeler & Co., Inc. (Keeler) appeal the district

*District Judge of the Southern District of Texas, sitting by designation. [Footnotes are in sequential order throughout the appendix)

court's grant of summary judgment in favor of the United States Army Corps of Engineers (the Corps). We affirm.

Facts and Proceedings Below

This case relates to the Corps' administration of its set-aside program for minority businesses (the 8(a) program), as described in the Small Business Act § 8(a), 15 U.S.C. § 637(a). The operation of the 8(a) program is delineated in *Fordice Constr. Co. v. Marsh,* 773 F.Supp. 867, 869-70 (S.D.Miss.1990). As noted in that opinion, Congress created the 8(a) program to encourage minority small-business enterprises. *Id.* at 869. Under this program, the Small Business Administration (SBA) determines which minority businesses are eligible to participate in the 8(a) program. 15 U.S.C. § 637(a)(4)-(8). The SBA then acts as an intermediary between government procurement agencies—such as the Corps—and these certified minority businesses. Under this system, a procurement agency's proposed project may be placed in the 8(a) program in one of three ways, all of which are entirely at the discretion of the SBA and the procurement agency: (1) the

SBA advises the procurement agency of an 8(a) firm's capabilities and asks that agency to identify and submit to the 8(a) program its proposed contracts that support the firm's business plan; (2) the SBA identifies a specific contract for a particular 8(a) firm and asks the agency to offer the contract to the 8(a) program for the firm; or (3) the agency reviews its proposed contracts and identifies and offers those which are suitable for the 8(a) program. *Id.* at 637(a)(1)(A); 48 C.F.R. §§ 19.800(b), 19.803(a)-(c), 19.804.[1] Once a contract has been set aside for minority businesses, the SBA then selects the minority contractor best suited to perform the contract. 15 U.S.C. § 637(a)(1)(B), (a)(7)(A); 13 C.F.R. § 124.307(d). The SBA, on behalf of the minority contractor, then certifies to the procurement agency that the minority contractor can perform

[1] A minority contractor may also influence this discretionary process through informal "self-marketing." Self-marketing is a way for 8(a) contractors to notify a procurement agency of projects the agency could choose to refer to the SBA. The 8(a) contractors contact that agency's personnel and market their services concerning projects that the contractors could work on. The agency can then decide to refer the project to the SBA which may, in its discretion, give the project to the contractor who engaged in the self-marketing. 48 C.F.R. §§ 19.803(c), 19.804-2(a)(12).

the contract, and the SBA begins to negotiate with the agency's contracting officer upon mutually agreeable terms and conditions. 48 C.F.R. § 19.800(c). Alternatively, upon mutual agreement between the SBA and the agency, the minority contractor itself may be allowed to negotiate with the agency. 48 C.F.R. § 19.808-1(b). Throughout this process, it is within the procurement agency's discretion to withdraw the project from the 8(a) program before the contract is awarded. 48 C.F.R. § 19.800(c). Finally, the minority contractor cannot be awarded the project if the price of the contract results in a cost to the procurement agency which exceeds a fair market price. 48 C.F.R. § 19.806(b).

Prior to the case *sub judice,* three nonminority small-business contractors challenged the Corps' joint administration of the 8(a) program with the SBA. Specifically, these contractors challenged the Corps' submission practice whereby it set aside one-hundred percent of its small-business contracts for minority businesses. These contractors contended that in setting aside one-hundred percent of the contracts, the

agencies failed to consider the effect a minority enterprise set-aside would have on competing nonminority small-business contractors. The district court initially dismissed the suit on mootness grounds, and we reversed. *Valley Constr. Co. v. Marsh,* 714 F.2d 26 (5th Cir.1983) (*Valley I*). On remand, the district court held that the Corps' administration of the 8(a) program impermissibly excluded the nonminority small-business contractors in violation of 42 U.S.C. § 2000d, and that the SBA ignored its statutorily directed policy pursuant to 15 U.S.C. § 637(d)(1) requiring it to consider the economic impact on these contractors. *Fordice,* 773 F.Supp. at 882. The government initially appealed the decision, but it withdrew its appeal on October 23, 1990.

In early November 1990, in response to the *Fordice* decision and the withdrawal of the government's appeal, the Corps sought legal guidance from Army Headquarters concerning the continuing legality of its administration of the 8(a) program, and the possible personal liability of the contracting officers in submitting contracts to the SBA under

the program. While awaiting advice, the Corps continued to abide by previously awarded 8(a) contracts, and exercised the options on all 8(a) contracts for extending performance by the minority contractor into later years. Although the Corps did not terminate any pre-existing 8(a) contracts, it did hold in abeyance any ongoing activity in reference to 8(a) contracts not yet awarded. This abeyance continued until January 22, 1991, when the Corps received guidance from Army Headquarters notifying it that, as to the currently administered 8(a) program, there existed no legal impediment to awarding contracts to the SBA through the 8(a) program.[2]

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[2]Subsequently, this advice was at least partially confirmed by this Circuit, which held in a separate case that the Corps there properly administered the 8(a) program in conformity with newly promulgated regulations. *See* 48 C.F.R. 19.804-1(2)(3); *Valley Constr. Co. v. Marsh,* 984 F.2d 133, 135 (5th Cir.1993) (*Valley II*) (Corps reasonably interpreted regulation not to require "impact analysis" for "new, non-recurring construction contracts"). The appellant attempted to rely on *Fordice* as authority for the proposition that the Corps was still improperly awarding contracts to minority businesses under the 8(a) program because it was not considering the economic impact of nonminority businesses, but we determined that "[n]ot only is *Fordice* factually distinguishable from this case, but it is non-binding on this court." *Id.* at 135 n. 5.

On January 8, 1991, EJA, Enplanar, Dragon, and Keeler (collectively, the Contractors) brought suit in Louisiana seeking injunctive and declaratory relief against, *inter alia,* the Corps and its personnel in their official capacities, and the SBA (collectively, the Defendants), claiming that the Corps' suspension of their 8(a) referrals to the SBA discriminated against the Contractors in violation of 42 U.S.C. §§ 1981, 1985(3), 2000d. The Contractors also argued that the suspension was an unconstitutional taking of their property rights without due process.

Specifically, EJA alleged that, prior to the abeyance, the Corps failed to renew the Southwest Pass program even though EJA had worked on the project during the previous year. The Corps did not dispute that in April of 1990, it had decided not to place the project in the 8(a) program because it already had four of its ten small-business projects in the program, and was concerned about the potential legal liability of adding more small-business projects to the 8(a) program. EJA alleged that it had a reasonable expectancy that the project would be renewed

but because of the constitutional concerns, the project was pulled from the 8(a) program. Enplanar alleged that it was in negotiations concerning two 8(a) contracts but the Corps' suspension had indefinitely postponed the implementation of these projects. Dragon and Keeler alleged that the suspension had indefinitely delayed the Corps from making referrals for other, unspecified, future projects which the SBA might give to Dragon or Keeler when and if the projects materialized. Finally, Keeler also alleged that the Corps had wrongfully failed to award it the Cotton Meade project.[3] The Contractors asked for injunctive relief which would remove the suspension and order the Corps to award the Southwest Pass project to EJA and the Cotton Meade Project to Keeler.

On February 8, the district court directed the parties to brief whether the SBA was a necessary party in light of the fact that the suspension had been lifted. On February 27, in its

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[3] Keeler began negotiating for the Cotton Meade project on April 25, 1989. The Corps withdrew the project from the 8(a) program on August 28, 1990. Keeler claimed that this project was withdrawn in bad faith.

responsive brief, the Contractors stated that the SBA was not a necessary party, and indicated in the summary of its argument that all injunctive relief was moot. However, in the argument itself, they asked for injunctive relief as to the Cotton Meade project. On March 13, the district court denied the Contractors' partial motion for summary judgment seeking injunctive relief finding that all such relief was moot.

The Defendants then filed motions for summary judgment and for change of venue. On March 26, the magistrate stayed discovery pending a ruling on the venue motion. The Contractors made a Rule 56(f) motion to compel discovery, which was denied. Subsequently, the Contractors filed an amended complaint alleging post-suspension claims for retaliation and unconstitutional interference with the Contractors' rights of access to the courts, based on the Corps engineers' refusal to meet with the Contractors during the pendency of this suit. This amended complaint added as defendants Corps' engineers Stephenson W. Page (Page) and Robert Green (Green) in their individual capacities (the original

complaint had included them in their official capacities). It also requested attorneys' fees, claiming that the Contractors' lawsuit caused the Corps to lift its suspension. In response, the Defendants filed a supplemental memorandum in support of their motions for summary judgment, addressing the new claims.[4] On July 15, the district court granted summary judgment on all of the Contractors' claims except for Keeler's claims concerning the Cotton Meade project. These latter claims were transferred to Mississippi based on the Defendants' motion for change of venue.

Discussion

The Contractors now argue on appeal that the district court erred by: (1) denying their motion for partial summary judgment on the merits for injunctive relief; (2) denying their additional discovery; (3) prematurely ruling on their claims; (4)

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[4] This response also included a supplemental memorandum concerning the Defendants' earlier motion to dismiss the complaint against Green and Page. The Defendants argued that their service had been improper under Federal Rule of Civil Procedure 4(c)(2)(C)(ii) and that therefore their complaint should be dismissed pursuant to Rule 12(b)(5).

granting summary judgment against their claims concerning the Defendants' alleged suspension of the 8(a) program and retaliation; (5) dismissing their claim for attorneys fees; and (6) granting the change of venue motion regarding Keeler's Cotton Meade project claims.

I. Denial of Injunctive Relief

The Contractors contend that the district court erred in denying as moot their motion for partial summary judgment concerning injunctive relief. They admit that the resumption of the 8(a) program did moot their request for injunctive and declaratory relief which sought to lift the Corps' suspension of the 8(a) program. However, they argue that the district court erred in ruling that they also were not entitled to injunctive relief concerning the Southwest Pass project and the Cotton Meade project. They contend that the district court erroneously found all of their requested injunctive relief moot based on their statement summarizing the argument in their brief that the Corps' resumption of awarding new 8(a) contracts "moots all injunctive relief concerning the 8(a) Program." They now

contend that the argument in their brief made clear that only the injunctive relief requesting the suspension's removal was moot and that the relief regarding the specific projects was not moot. We tend to agree. A party should not fear the forfeit of his requested relief based merely on a statement made in the introductory section of his brief summarizing his argument. However we still find that the district court did not err in denying such relief.

In *Valley I*, we held that as to the Corps' administration of the 8(a) program, "injunctive relief would be improper because a necessary party to the suit is the SBA, which administers the overall § 8(a) minority enterprise set-aside program. The Small Business Act, 15 U.S.C. § 634(b)(1), precludes injunctive relief against the SBA. We ... will not allow the contractors to obtain indirectly (against the Army) what they cannot obtain directly (against the SBA)." 714 F.2d at 29.[5] We find that this holding

[5]The Contractors argue that the SBA is no longer a party in this case except for its possible liability as to attorneys' fees, and that any injunctive relief granted concerning the Southwest Pass and Cotton Meade projects would not affect the SBA. We disagree. If a court ordered the Corps to award these projects to specific 8(a)

is the controlling law in this case.[6] The district court did not err in finding that the Contractors were barred from receiving

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participants, this order would also require injunctive relief concerning the SBA's conduct as to its statutory duties regarding its selection of 8(a) contractors for a specific project, and its subsequent negotiations with a procurement agency concerning the terms of the project's contract. *See* 13 C.F.R. §§ 124.307(d), 124.308(d), 124.309; 48 C.F.R. § 19.800(c).

[6] The Contractors argue that this holding is no longer binding because The Federal Courts Improvement Act of 1982 as codified at 28 U.S.C. § 1491(a)(3) now allows injunctive relief against the SBA¾and by extension, against agencies participating in the SBA's programs. This Court has not addressed the effect that section 1491(a)(3) has on the injunctive immunity of the SBA, although other courts have recognized that this law abrogates the SBA's injunctive immunity in certain circumstances. *See Cavalier Clothes, Inc. v. United States*, 810 F.2d 1108, 1111-112 (Fed.Cir.1987); *Related Industries, Inc. v. United States*, 2 Cl.Ct. 517 (1983). However, we need not decide this issue because section 1491(a)(3) applies only to cases brought before the United States Court of Federal Claims. 28 U.S.C. § 1491(a)(1); *Cavalier*, 810 F.2d at 1112 (holding that this section "specifically empowers the Claims Court generally to grant injunctive relief" against the SBA). Since this case was not brought before the Claims Court, section 1491(a)(3) is irrelevant.

The Contractors also argue that other circuits have held that the SBA is subject to injunctive relief in certain circumstances regardless of the applicability of section 1491(a)(3). *See Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1056 (1st Cir.1987), and cases cited therein. However, as noted by *Ulstein*, this Circuit has "concluded that all injunctive relief directed at the SBA is absolutely prohibited." *Id.* We are bound by our prior decisions that such relief is barred. *See Valley I*, 714 F.2d at 29, *Romeo v. United States*, 462 F.2d 1036, 1038 (5th Cir.1972), *cert. denied*, 410 U.S. 928, 93 S.Ct. 1361, 35 L.Ed.2d 589 (1973); *Expedient Servs., Inc. v. Weaver*, 614 F.2d 56 (5th Cir.1980).

injunctive relief against the Corps concerning its administration of the 8(a) program.[7]

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[7] Furthermore, as to EJA's claims concerning the Southwest Pass project, during oral argument it was revealed that EJA no longer exists, and therefore it cannot perform the contract. Consequently, the injunctive relief sought is actually "equitable monetary" relief which would provide money damages in lieu of the injunctive relief. Federal courts have granted injunctive relief against governmental units in which the performance of such relief would cost money. *See Edelman v. Jordan*, 415 U.S. 651, 680, 94 S.Ct. 1347, 1364, 39 L.Ed.2d 662 (1974) (Douglas, J., dissenting) (noting that in cases involving injunctive relief against state government entities "[m]ost ... decisions by federal courts have a financial impact on the States"). Furthermore, "a court in equity may award monetary restitution as an adjunct to injunctive relief." *Tull v. United States*, 481 U.S. 412, 424, 107 S.Ct. 1831, 1839, 95 L.Ed.2d 365 (1987). However, the Contractors do not cite to any authority where a court has granted monetary damages to a party as a substitute for injunctive relief. To allow such a result would destroy the distinction between monetary and equitable damages. *See Edelman*, 415 U.S. at 666, 94 S.Ct. at 1357 (rejecting the contention that in an equity proceeding relief in the form of money damages may be awarded under the rubric of "equitable restitution" because "the relief may be labeled 'equitable' in nature"). Furthermore, since EJA's claim concerning the Southwest Pass project names only the Corps and its divisions as defendants, it is thereby suing only the United States. Consequently, it should have brought such a monetary claim in the Court of Claims. *See Amoco Production Co. v. Hodel*, 815 F.2d 352, 359 (5th Cir.1987), *cert. denied*, 487 U.S. 1234, 108 S.Ct. 2898, 101 L.Ed.2d 932 (1988). We conclude that the district court did not err in denying injunctive relief as to EJA's claims concerning the Southwest Pass project.

As to the Cotton Meade project, the district court's ruling is not before us. Keeler's claims concerning this project have not been disposed of, but merely transferred to a different venue. Therefore, the district

II. Discovery

The Contractors claim that the district court denied them proper discovery so that they were unable to create contested issues of fact to overcome the Defendants' summary judgment motions. Specifically, the Contractors contend that they were improperly denied discovery as to the abeyance of the 8(a) program, and as to Keeler's Cotton Meade claims. In reviewing such claims, "The trial judge's decision to curtail discovery is granted great deference and, thus, is reviewed under an abuse of discretion standard." *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 918 (5th Cir.1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 2340, 124 L.Ed.2d 251 (1993); *see also Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 436 (5th Cir.), *cert. denied*, 498 U.S. 895, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990).

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court's ruling denying the Contractors' partial summary-judgment motion concerning the availability of injunctive relief as to this project is an interlocutory order not subject to appeal at this time. *See* 10 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2715 p. 636 (noting that "the denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment"); *see also In re Corrugated Container Antitrust Litigation*, 694 F.2d 1041 (5th Cir.1983).

As to the Cotton Meade project, these claims were not disposed of in summary judgment, but were rather transferred to another court based on the Defendants' motion for change of venue. 28 U.S.C. § 1404(a); FED.R.CIV.P. 21. As such, the claims were still alive and still subject to discovery—albeit in a different venue. The Contractors cite to no authority, and we have found none, holding the district court has abused its discretion in denying merits-related discovery pending ruling on a motion for change of venue. Federal courts have long recognized that two of the factors supporting a change in venue are convenience of the witnesses and the location of records and documents. 15 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §§ 3851, 3853; *see also Southern Investors II v. Commuter Aircraft Corp.*, 520 F.Supp. 212, 218 (M.D.La.1981); *American Standard, Inc. v. Bendix Corp.*, 487 F.Supp. 254, 264 (W.D.Mo.1980). Although these factors are usually considered in connection with securing the witnesses' and documents' availability for trial, they also necessarily implicate the ease of conducting merits-related

discovery in a location which is near the relevant witnesses and documents. Moreover, if a change of venue motion is granted, the discovery is not denied but merely delayed. The Contractors tendered no showing that the delay in discovery somehow prejudiced their case respecting the Cotton Meade project through loss of documents or unavailability of witnesses. *See* FED.R.CIV.P. 61; *FDIC v. Fuller*, 994 F.2d 223 (5th Cir.1993); *King v. Gulf Oil Co.*, 581 F.2d 1184 (5th Cir.1978). The district court did not abuse its discretion in refusing to allow discovery concerning Keeler's claims arising from the Cotton Meade project pending the grant of the Defendants' change of venue motion regarding these claims.

Concerning the remaining claims, which were subsequently disposed of by the district court's grant of the Defendants' summary judgment motion, the Contractors were entitled to receive a continuance for additional discovery if they: (i) requested extended discovery prior to the court's ruling on summary judgment; (ii) placed the district court on notice that further discovery pertaining to the summary judgment

motion was being sought; and (iii) demonstrated to the district court with reasonable specificity how the requested discovery pertained to the pending motion. *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1155-56 (5th Cir.1993); *Wichita Falls*, 978 F.2d at 919 (citing *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir.1991)).

As to the first two requirements, we can review a claim alleging improperly denied discovery only if the complaining party presented to the district court a Rule 56(f) motion or an " "equivalent statement preferably in writing' that conveys the need for additional discovery" in the areas now complained of on appeal. *Wichita Falls*, 978 F.2d at 919 (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986)). In this regard, the Contractors contend in their reply brief that they made a Rule 56(f) motion or its equivalent in six separate instances. However, as to four of the motions cited to us, even when read broadly as complying with the requirements of Rule 56(f), these motions concern only the Cotton Meade project. Therefore, as to these motions, the Contractors failed to inform

the district court that they were seeking any additional discovery outside the scope of that project.

Only in two motions, do the Contractors bring to the district court's attention a request for additional discovery concerning claims other than the Cotton Meade project. In their opposition motion and additional opposition motion to the Defendants' motions for summary judgment and for change of venue, the Contractors note in passing that they have been refused a copy of the Justice Department's memorandum concerning its October 1990 determination not to appeal the *Fordice* decision.[8] In these passing references, they do not

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[8] The Contractors now complain on appeal that they were denied needed discovery as to: (1) an October 17, 1990 memorandum prepared by a member of the Corps; (2) a November 15, 1990 memorandum prepared by the Corps' assistant general counsel; (3) an undated memorandum by the Vicksburg district counsel; and (4) the September 1990 written recommendations of the Department of Justice, Small Business Administration, and the Department of the Army concerning the constitutionality of the 8(a) program. None of these matters were the subject of the Contractors' Rule 56(f) motions or equivalents. In their reply brief, the Contractors assert, with no citation to the record, that they notified the district court of their need for these documents. After a fruitless search of the record, we conclude that there exists no indication in the record that these matters were brought to the attention of the

explain how this requested discovery would or could create a fact issue to overcome the Defendants' summary judgment motion.[9] Therefore, they have failed the third requirement which requires them to demonstrate to the district court with reasonable specificity how the requested discovery would likely pertain to the pending summary judgment motion. *See Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993) (holding that a nonmovant's Rule 56(f) motion was insufficient where "absent from the affidavit was an explanation of ... how the materials listed in the plaintiff's first document request, or in the handwritten list appended to the affidavit, would enable plaintiff to oppose defendant's summary judgment motion by establishing a genuine issue of material fact"). Certainly, we are not requiring clairvoyance on

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district court, and therefore, it did not abuse its discretion in refusing to allow discovery concerning these matters.

[9] We infer from the placement of the stray remark noting that the Contractors had been denied this memorandum, that this undiscovered document will bolster their argument that the 8(a) program was suspended based on the Corps' contracting officers fear of personal liability. However, this matter is undisputed.

the part of the Contractors. They do not need to know the precise content of the requested discovery, but they do need to give the district court some idea of how the sought-after discovery might reasonably be supposed to create a factual dispute. The mere fleeting mention of a matter, without a description of its likely relevance, will not suffice to alert the district court to the potential importance of that undiscovered item. Therefore, the district court did not abuse its discretion in denying additional discovery.

III. Summary Judgment Procedure

The Contractors complain that the district court prematurely dismissed their claims of retaliation against defendants Page and Green in their individual capacity, and that it prematurely granted summary judgment in favor of all of the Defendants without giving the Contractors notice. Specifically, the Contractors assert that the district court *sua sponte* dismissed their claims against Page and Green because the only motion filed on their behalf was a motion to dismiss for improper service which was subsequently cured.

Furthermore, the Contractors claim that the district court granted summary judgment dismissing their amended complaint although the Defendants failed to move for summary judgment as to that complaint.

These two arguments conveniently overlook the Defendants' supplemental memorandum in support of their motions for summary judgment. This document was filed on May 13, 1991, after the Contractors' amended complaint, and it specifically addresses the claims in that amended complaint. This document addresses, as a ground for dismissal, the Contractors' failure to properly serve Page and Green, but it also explicitly discusses various grounds for summary judgment as to *all* the defendants—including the retaliation claims brought against Page and Green. Therefore, this memorandum served to supplement the original summary judgment motion, and provided the Contractors with notice of the Defendants' challenges to their amended complaint. *Cf. Spickard v. Ribicoff*, 211 F.Supp. 555, 558 (W.D.Ky.1962) (granting summary judgment where *no* motion was filed but

the movant submitted a brief in support of summary judgment and the nonmovant treated it as a summary judgment motion).[10] Although the district court on July 15, 1991, granted a dismissal as to Page and Green, it also granted summary judgment as to *all* the defendants based on evidence not contained in the pleadings. Under these circumstances, the district court's order to dismiss the complaint as to Page and Green is disregarded, and we instead review the grant of summary judgment as to all defendants—including Page and Green. *See* FED.R.CIV.P. 12(b); *Wilson v. U.S. Dept. of Agriculture,* 991 F.2d 1211, 1214 (5th Cir.1993); *Conoco, Inc. v. Republic Ins. Co.,* 819 F.2d 120, 122 n. 1 (5th Cir.1987) (treating a court's order as granting summary judgment and disregarding the statement in the order directing, "and this case

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[10] This case is distinguishable from *Reese v. Sparks,* 760 F.2d 64 (3d Cir.1985), which held that a district court could not grant summary judgment on an amended complaint based on a motion for summary judgment filed before that amended complaint if the amended complaint contained new legal theories and additional, different facts. *Id.* at 66. Here, the equivalent of a summary judgment motion was properly filed after the amended complaint and it specifically addressed the new claims alleged in it.

is dismissed"). The district court did not *sua sponte* dismiss the claims against Page and Green, but rather granted summary judgment in their favor based on the Defendants' memorandum in support of summary judgment filed approximately two months previously. *Cf. Carolinas Cotton Growers Ass'n v. United States*, 785 F.2d 1195, 1200 (4th Cir.1986) ("[I]t is the conclusion of the court that the references to summary judgment are in fact simply mislabelings not affecting the validity of the finding of the court below.").[11] This equivalent

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[11] Since the Defendants filed the supplement to their summary judgment motion some two months before the district court entered summary judgment, the Contractors received sufficient notice of the Defendants' new arguments supporting their summary judgment motion. *See* FED.R.CIV.P. 56(c) (requiring that the summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir.1991); *Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 568 n. 15, 107 S.Ct. 1410, 1417 n. 15, 94 L.Ed.2d 563 (1987). This two-month notice also satisfied the "hearing" requirement in Rule 56(c). As long as the nonmovants have sufficient notice of the pending summary judgment motion, the district court may rule on that motion based solely on the pleadings and evidence on file without a formal conference with the parties. *See Western Fire Ins. Co. v. Copeland*, 786 F.2d 649, 652 (5th Cir.1986) (holding that the district court erred by not affording the nonmovants "either the ten-day notice of Rule 56(c) or an opportunity to present their evidence"); *Cowgill v. Raymark Indus. Inc.*, 780 F.2d 324, 329 (3d Cir.1985) (holding that nonmovant not

of a motion for summary judgment explicitly also covered the other defendants, and served as the proper basis for the district court's summary judgment as to those defendants. Therefore, the district court did not prematurely rule on the Contractors' claims.

IV. Summary Judgment Claims

The Contractors contend that the district court erred in granting summary judgment dismissing the claims in their amended complaint. This Court reviews a district court's grant of summary judgment *de novo,* taking the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party, and determining whether the pleadings, depositions, answers to interrogatories, and affidavits show that there is no genuine issue of material fact and that the moving

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entitled to notice of date when motion for summary judgment would be resolved because the nonmovant "is under an obligation to respond ... in a timely fashion and to place before the court all materials it wishes to have considered when the court rules on the motion"); *see also Daniels v. Morris,* 746 F.2d 271 (5th Cir.1984); *Brumley Estate v. Iowa Beef Processors, Inc.,* 704 F.2d 1351 (5th Cir.1983), *cert. denied,* 465 U.S. 1028, 104 S.Ct. 1288, 79 L.Ed.2d 690 (1984).

party is entitled to judgment as a matter of law. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 127 (5th Cir.1991); FED.R.CIV.P. 56(c). Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Here, the burden of proof was on the Contractors.

The Contractors first argue that the district court erred in ruling that they were not entitled to declaratory relief arising from the partial suspension of the 8(a) program.[12] They

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[12] The Contractors also claim on appeal that they were denied a property interest without procedural due process in violation of the due process clause of the Fifth Amendment because the suspension was enacted without notice or a hearing. As a result, they claim they are entitled to monetary damages on a *Bivens* constitutional-tort claim based on the suspension. *See Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). However, a *Bivens* claim is available only against government officers in their individual capacities. *Williamson v. U.S. Dept. of Agriculture*, 815 F.2d 368, 380 (5th Cir.1987) (holding that a *Bivens* claim "only applies against the individual appellees in their individual capacities"). In their claim concerning the suspension, the Contractors state that the only defendants are "the Corps of

contend that because of their minority status they were denied their equal-protection rights, and that the 8(a) program was administered in a discriminatory manner in violation of 42 U.S.C. §§ 1981, 1985(2), 2000d. However, the Defendants articulated a nondiscriminatory reason for the suspension, namely that it was due to the *Fordice* decision which found that the Corps' practice of awarding a large number of small-business projects to the minority set-aside program was improper. The Contractors admit in their briefs to this Court that the suspension was due to the Defendants' belief that the 8(a) program was unconstitutional as a result of the *Fordice* decision. The Contractors even surmise that the presidential administration—at the time of the suspension—believed that all minority set-aside programs were unconstitutional. They

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Engineers and the Vicksburg Corps," which are subdivisions of the United States. The United States may be sued only under the Federal Torts Claims Act. *See Rykers v. Alford*, 832 F.2d 895, 897 (5th Cir.1987) (holding that "[t]he United States may be sued only within the exception to sovereign immunity provided by the Federal Torts Claims Act"). This the Contractors have failed to do. The Contractors have not raised a cognizable *Bivens* claim concerning the suspension.

then make the conclusory assertion that such a belief was an unjustified pretext. We disagree.

The three-month suspension affected only the Corps' decisions regarding the submission of new projects to the SBA. Such a decision is within the complete discretion of the Corps. 48 C.F.R. § 19.803(a)-(c). Even when the Corps offers a project to the SBA, it is then within the SBA's complete discretion to accept the project, and then to select a minority contractor to work on the project. 15 U.S.C. § 637(a)(1)(B); 13 C.F.R. §§ 124.307(d), 124.309. Therefore, this is not an instance where a government agency is accused of discrimination because of its failure to undertake some mandatory requirement; rather, this is an instance where the agency's discretionary failure can be fairly attributed to reasons other than invidious discrimination.[13] Here, the Corps' decision

[13] We do not hold that a minority plaintiff cannot prevail on a claim for discrimination where an agency has unfettered discretion but chooses to use such discretion to discriminate against minorities. Rather, we are merely pointing out that complete discretion makes it more difficult for a minority plaintiff to make out a prima facie case, since the violation of a mandated policy in and of itself can serve as the basis for the finding of discriminatory intent. *See Young v. Pierce,*

to suspend the submission of new contracts to the SBA was reasonable in light of the *Fordice* decision in which the district court issued a declaratory judgment finding that the Corps had illegally administered the 8(a) program—specifically in regard to its submission practice. 773 F.Supp. at 882. If the *Fordice* decision was a mere pretext for discrimination on the Corps' part, then it seems remarkable that the Corps would have sought legal advice, and then after a mere three months, the Corps upon receipt of that advice would have immediately lifted the suspension concerning that part of the 8(a) program which was directly involved in the *Fordice* litigation. The Contractors have failed to carry their burden to produce summary judgment evidence which would sustain a finding that the Defendants' proffered reasons were a mere pretext for discrimination. *See Guthrie v. Tifco Industries,* 941 F.2d 374, 378 (5th Cir.1991), *cert. denied,* --- U.S. ----, 112 S.Ct. 1267,

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822 F.2d 1368, 1371 (5th Cir.1987) (finding of discriminatory intent by the Department of Housing and Urban Development based on its failure to perform its affirmative duty under Title VIII to learn of and to abate segregation in public housing).

117 L.Ed.2d 495 (1992) (holding that in deciding a summary judgment motion "[a]bsent countervailing evidence, the trier of fact must accept the defendant's explanation as the real reason" for the action); *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir.1991), *cert. denied*, --- U.S. ----, 112 S.Ct. 935, 117 L.Ed.2d 106 (1992) (granting summary judgment when "the defendant's proffer of credible, nondiscriminatory reasons for its actions is sufficiently probative, then the plaintiff must come forward with specific evidence demonstrating that the reasons given by defendant were a pretext for discrimination"). Given the Corps' unfettered discretion and its real apprehensions regarding the legality of its administration of the 8(a)-program, we find that the Contractors have failed to carry their burden of proof to refute the reasons offered by the Defendants. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir.1987) (holding that a defendant can present such strong evidence of a nondiscriminatory rationale that summary judgment is warranted). Therefore, the district court did not err

in granting summary judgment against the Contractors' discrimination claims.[14]

Finally, the Contractors contend that the district court erred in rejecting their *Bivens* claims for declaratory, injunctive, and monetary relief. Their *Bivens* claims alleged constitutional torts against Page and Green for denying the Contractors the ability to self-market their services to the Corps.[15] Under *Bivens*, "the victim of a constitutional violation by a federal agent has a right to recover damages against the agent in federal court." *Bush v. Lucas*, 647 F.2d 573, 575 (5th

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[14] The Contractors also complain that the district court erred in granting summary judgment against EJA's claim concerning the Southwest Pass project. However, as explained above, the Corps had complete discretion concerning whether it would submit the project to the 8(a) program. The Contractors argue that EJA had already worked on the project the prior year and had an "expectation" that it would receive the project again. They allege it did not receive the project because the Corps feared that too many of its small business set-asides were going into the 8(a) program. Assuming this explanation is true, it still does not suffice to sustain a finding that the Corps' decision not to submit the project was based on a discriminatory intent.

[15] The Contractors also brought this claim against the Corps, but as already explained above, such a claim is cognizable only against individuals. *Williamson, supra.*

Cir. Unit B June 1981), *aff'd,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Therefore, a *Bivens* action requires the plaintiff to "claim a deprivation of a constitutional right." *Zernial v. United States,* 714 F.2d 431, 435 (5th Cir.1983). This action extends to alleged violations of the First Amendment and to deprivations of Fifth Amendment due process rights. *Bush,* 462 U.S. 367, 103 S.Ct. 2404 (First Amendment); *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (Fifth Amendment). The Contractors' *Bivens* claims are based on two theories: that they have a right to self-marketing and they have been deprived of that right without procedural due process in contravention of the Fifth Amendment; and that this denial of self-marketing is in retaliation against the Contractors, and is an attempt to deny them access to the courts as is their right under the First Amendment.

To succeed on a procedural due process claim, the Contractors must show they had a "cognizable property or liberty interest," and such a property interest must be "a

legitimate claim of entitlement." *Broadway v. Block*, 694 F.2d 979, 985 (5th Cir.1982). Here, there exists no legitimate claim of entitlement. The Contractors have no right to access of Corps personnel for this purpose. 48 C.F.R. 19.803(c). As described above, under the 8(a) program, the SBA, and not the individual minority contractor, is authorized to contract as the prime contractor with the procurement agency. *Id.* The SBA may, in its discretion, allow the individual minority contractor to negotiate directly with the procurement agency, and familiarize that agency with its capabilities for future contracts; but the SBA is not required to do so. 48 C.F.R. §§ 19.803(c), 19.804-2(a)(12). These direct communications through "self-marketing" are not *required* by any statute or regulation. As found by the district court, the Contractors are allowed to self-market at the sufferance of Corps personnel, and the Corps has complete discretion concerning whether it will give such access to the Contractors. Under these facts no liberty or property interest is implicated. The district court did not err in

finding that the Contractors had failed to present a violation of procedural due process.

The Contractors also contend that the denial of self-marketing is in retaliation for the lawsuit and is designed to chill access to the courts of the United States in violation of the Contractors' First Amendment rights.[16] Because of the preeminent place that the First Amendment occupies in our constitutional jurisprudence, the Contractors need not prove that in being denied the right to self-market, they have been denied a property right or liberty interest or some other independent legal right. *See Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). But they still must show a constitutional violation. Here, the fact that the

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[16] In their opaque brief, the Contractors make some murky allusions to the possibility that their First Amendment rights have also been violated by the mere fact that Page and Green will not speak to them. They cite no authority for this theory, and we will not root about in the case law seeking support for it. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Furthermore, their amended complaint does not offer this theory as a basis for recovery, and they did not argue this theory below. Therefore, the Contractors have waived any claim on this basis.

contracting officers' refused to speak to the Contractors during the pendency of this suit does not indicate that such refusal was made in an effort to chill the Contractors' access to the courts or to punish them for having brought suit. Rather, such a refusal was made pursuant to an Information Paper that instructed agency procurement officers to avoid contact with contractors during the pendency of their litigation with the agency.[17] This paper was issued on February 6, 1990—months before the suspension—and was apparently distributed by the Army's general counsel to all defense procurement agencies. It notes that contact should be avoided so that the procurement officer will not inadvertently "give the contractor any ammunition to weaken the Government's position. Any such statements may be used by the contractor in litigation and may ultimately lead to the depositions of the officials who make the

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[17] The Contractors now contend that this paper is hearsay, and cannot be relied on by the district court in rendering summary judgment. However, they did not raise this hearsay objection below, so the error, if any, is waived. *See United States v. Maddox*, 492 F.2d 104, 107 (5th Cir.), *cert. denied*, 419 U.S. 851, 95 S.Ct. 92, 42 L.Ed.2d 82 (1974) (holding that "[a] rule of evidence not invoked is waived").

statements and their subsequent testimony." A government employee who is a potential witness is not improperly chilling access to the courts or retaliating for use of the judicial system when he refuses to speak to a party concerning a matter that is related to the gravamen of that party's litigation against him or his employer. Page and Green did not deny the Contractors their constitutional rights under the First Amendment. There is nothing which would sustain a finding that Page and Green's actions—perhaps more accurately, their inactions—were retaliatory or motivated by considerations other than those of the Information Paper or that they were a pretext for unconstitutional retaliation. Consequently, "any assertion that [the officers'] actions ... were retaliatory can only be speculation." *Bowles v. U.S. Army Corps of Engineers,* 841 F.2d 112, 117 (5th Cir.), *cert. denied,* 488 U.S. 803, 109 S.Ct. 33, 102 L.Ed.2d 13 (1988). The district court did not err in finding that since access for self-marketing was discretionary and that the denial of self-marketing was based on official army

policy, it was not unconstitutional or "retaliatory" for Corps personnel to avoid the plaintiffs during the litigation.[18]

V. Attorneys' Fees

The Contractors argue that they are entitled to attorneys' fees under 28 U.S.C. § 2412(d) and 42 U.S.C. § 1988 because by filing the lawsuit and vigorously prosecuting it, they forced the Corps to resume the 8(a) program. Allegedly, these actions qualify them to be considered as prevailing parties because they "acted as a catalyst in prompting the opposing party to

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[18] Furthermore, as to both *Bivens* claims, the Contractors sought monetary damages against Page and Green. However, as pointed out by the district court, the Contractors introduced no evidence showing that Page's and Green's refusal to speak with the Contractors led to the Contractors being denied any contracts. In an earlier suit against the Corps concerning the discretionary award of contracts, this Court noted that the plaintiffs wisely abstained from pressing any claims for monetary damages because, "Such a claim would force upon them the Herculean task of proving the Corps actually would have awarded them the contracts in question in the absence of the claimed violations." *Valley I*, 714 F.2d at 29 n. 4. In the case *sub judice*, not only have the Contractors failed to show that the Corps would have awarded them contracts if the Contractors were allowed to self-market, but they have also failed to describe any particular contracts as to which they were in contention. Therefore, for this reason also, the district court did not err in finding that the Contractors were not entitled to monetary damages based on their *Bivens* claims.

make amends." *Ramon by Ramon v. Soto,* 916 F.2d 1377, 1384 (9th Cir.1989). We reject these contentions.

Section 1988 can serve as the basis for the recovery of attorneys' fees only if the Contractors can show that they have presented a substantial racial discrimination claim. *See Kelly v. City of Leesville,* 897 F.2d 172, 177 (5th Cir.1990); *McDonald v. Doe,* 748 F.2d 1055, 1077 (5th Cir.1984) (noting that section 1988 "was adopted because the actions in which fees are allowed vindicate rights based on the federal constitution or federal statutes. If it is determined that no constitutional right was violated, the predicate for the award of fees vanishes."). However, as we have discussed above, the Contractors have wholly failed to make out a claim for racial discrimination. At best, the Contractors have alleged that the Corps suspended the 8(a) program for an inadequate reason: their fear that the *Fordice* decision will lead to further lawsuits or potential liability concerning their participation in the 8(a) program. But, the Corps' suspension of the program based on its reaction to the *Fordice* decision does not somehow transmute that

motivation into racial discrimination. Even assuming that the Contractors' actions caused the resumption of the 8(a) program, since the suspension was not based on any racial animus, the Contractors could not recover under section 1988(b) and therefore cannot be considered prevailing parties under that statute. *See McQuiston v. Marsh,* 707 F.2d 1082, 1085 (9th Cir.1983) (finding that an unsuccessful bidder on a government contract could be a prevailing party under section 2412 based on his claim of bad faith, but not under section 1988 because he could not prevail on his discrimination claim).

The Contractors can recover under the Equal Access to Justice Act codified at section 2412(d)(1)(A) only if they show: (1) that they are a "prevailing party"; (2) that the Government's position was not "substantially justified"; and (3) that no "special circumstances make an award unjust." *Perales v. Casillas,* 950 F.2d 1066, 1072 (5th Cir.1992).[19] The

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[19] We note that the *Ramon* court decided only the first factor and held that the plaintiffs were entitled to fees "unless the government's position was substantially justified or special circumstances would make an award unjust." *Ramon,* 916 F.2d at 1384. Therefore, even if the Contractors can be classified as "catalysts" for the Defendants'

Contractors have not alleged any facts showing that the Defendants' position was not substantially justified. Since the Defendants' abeyance was based on the adverse *Fordice* decision, we find that their position concerning the suspension of the 8(a) program pending further guidance was substantially justified. Therefore, the district court did not err in denying attorneys' fees to the Contractors.

VI. Change of Venue

The Contractors contend that the district court erred in granting the Defendants' change of venue motion as to Keeler's Cotton Meade project claims. However, the grant of a change of venue motion is an interlocutory order and is not reviewable. *See Louisiana Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1033-34 (5th Cir.1987); *Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir.1970); *Chas. Pfizer & Co. v. Olin Mathieson Chem. Corp.*, 225 F.2d 718 (5th Cir.1955). Keeler's Cotton Meade project claims have been severed from this

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resumption of the 8(a) program, they still must satisfy the remaining requirements of section 2412(d).

action and transferred to a different forum. These claims are unreviewable in this appeal.

Conclusion

Based on the foregoing, the district court's orders are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7633

Summary Calendar

ENPLANAR, INC., ET AL.,
Plaintiffs,

JEAN H. TURNER, Trustee of
V. KEELER & CO., INC.,
Appellant,

VERSUS

JOHN MARSH, Secretary of the Army of
the United States, ET AL.,
Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-J91-0413(R)(C))

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges:

PER CURIAM:[20]

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[20] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

V. Keeler & Co., Inc., appeals the dismissal of its claim for lack of subject matter jurisdiction. We AFFIRM.

I.

Keeler and other minority contractors initiated this action in the Eastern District of Louisiana against various defendants, asserting claims relating to the administration of the 8(a) (minority set-aside) program in Mississippi and Louisiana. All of the counts in that complaint were dismissed, except for Count VI, which was transferred to the Southern District of Mississippi. We affirmed the dismissal of the other counts. *Enplanar, Inc.* v. Marsh, 11 F.3d 1284 (5th Cir. 1994).

This appeal concerns the dismissal of Count VI for lack of subject matter jurisdiction, after transfer to the Southern District of Mississippi. Count VI is a claim against "the Corps of Engineers and the Vicksburg Corps" for an unspecified amount of damages.[21] Keeler was allegedly designated by the

[21] We briefly recount the allegations pertinent to Count VI, but note that a more thorough account is set forth in *Enplanar Co., Inc. v. Marsh*, 11 F.3d 1284 (5th Cir. 1994).

defendants to negotiate for and, if negotiations were concluded in accordance with applicable regulations, to receive the Corps contract for the Cotton Meade Cap-Out project. The complaint then recites various alleged improprieties that occurred in connection with the project and concludes that, as a result, Keeler suffered actual damage on account of the discriminatory conduct of the Vicksburg Corps of Engineers in violation of 42 U.S.C. §§ 1981 and 2000d. Keeler seeks recovery of damages in an amount to be determined by the court.

After the case was transferred, the defendants moved to dismiss for lack of subject matter jurisdiction and to stay discovery pending resolution of that motion. On April 2, 1992, after the motions were argued to the district court, Keeler filed a Second Amended Complaint. On November 4, 1992, the district court granted the motion to dismiss and also denied leave to file the Second Amended Complaint, noting that no motion for leave to amend had been filed. The district court's final order was entered on August 6, 1993; and Keeler

thereafter moved for reconsideration, which motion was denied.

II.

A.

Keeler asserts first that the district court improperly dismissed Count VI for lack of subject matter jurisdiction. Count VI is a claim for monetary damages against the Vicksburg Corps and the Corps of Engineers, both of which are subdivisions of the United States. *Enplanar,* 11 F.3d at 1294 n.12. Keeler's claims can therefore only "proceed in the forum and manner allowed by the sovereign for that purpose." *Simanonok v. Simanonok*, 918 F.2d 947, 950 (Fed. Cir. 1990). Here, the forum is prescribed by the Tucker Act, 28 U.S.C. § 1346(a)(2) and 1491(a), which "vests concurrent jurisdiction in the Claims Court and the federal district court over any claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." *Amoco*

Production Co. v. Hodel, 815 F.2d 352, 358 (5th Cir. 1987) (footnote omitted). But, the Court of Claims has exclusive jurisdiction if the claim exceeds $10,000. 28 U.S.C. § 1491(a)(1); *Amoco*, 815 F.2d at 358.

Therefore, the district court properly held that it lacked subject matter jurisdiction if "(1) the action is against the United States; (2) the action is founded upon the Constitution, federal statute, executive regulation, or government contract; and (3) the action seeks monetary relief in excess of $10,000." *Amoco*, 815 F.2d at 359.

Keeler's action is clearly against the United States. *See Enplanar,* 11 F.3d at 1294 n.12 (Vicksburg Corp and Corps of Engineers are subdivisions of United States). Further, according to the express language of Count VI, the action is founded upon federal statutes, 42 U.S.C. §§ 1981 & 2000d. Finally, the action seeks an unspecified amount of monetary damages, thus rendering it fatally defective.[22] *See Sheehan v.*

[22] This defect was brought to the attention of Keeler by the defendants as well as by the district court, but Keeler made no attempt to amend. Indeed, the district court noted that it had specifically requested Keeler's

Army & Air Force Exchange Service, 619 F.2d 1132, 1137 n.7 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982).[23]

Keeler's assertions that the district court had jurisdiction under other statutory provisions are without merit. 15 U.S.C. S 634(b) provides jurisdiction for claims against the Small Business Administration, an entity which is not a defendant here. The jurisdictional provision of the Administration Procedures Act, 5 U.S.C. § 702, also does not provide a jurisdictional base, because Count VI alleges no claims under

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counsel to explain how its request for monetary damages was consistent with the jurisdictional requirements of the Tucker Act, and that counsel failed to provide any satisfactory response. Accordingly, we are neither compelled nor inclined to allow Keeler yet another opportunity to correct its pleadings at this point.

[23] Keeler appears to argue that the district court should have exercised jurisdiction because the Court of Claims will likely not have jurisdiction over all of the plaintiffs' claims. This argument misses two points. First, the only claim before this Court is Count VI, not other claims Keeler might desire to assert. Second, regardless of the substance of Keeler's other claims, or the desirability of trying them in one forum, this court is without authority to expand the jurisdiction of the district court or to waive sovereign immunity, both of which would be necessary to allow Keeler to pursue Count VI in the district court.

that Act. In any event, § 702 jurisdiction is limited to claims "seeking relief other than money damages" and is not available for claims for monetary damages such as Count VI.[24]

For these reasons, the district court properly granted the defendants' motion to dismiss for lack of subject matter jurisdiction.

B.

Keeler contends next that the district court erred in refusing it additional discovery before ruling on the motion to dismiss.[25] As we recently held in a related context, a party against whom a motion for summary judgment has been filed may be entitled to additional discovery if they "(i) requested

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[24] Keeler asserts in its reply brief that we should consider the attack on subject matter jurisdiction in light of the allegations contained in the Second Amended Complaint. The district court, however, dismissed the complaint based on the only claim that was before it, Count VI, and that is the dismissal that we review on appeal, particularly in light of our affirmance of the district court's denial of leave to amend the complaint, discussed *infra*

[25] It is not clear from the record that the district court did anything that prevented Keeler from taking discovery. The defendants moved to stay discovery pending resolution of the motion to dismiss and Keeler opposed that motion, but the court never ruled on the discovery motion until it granted the dismissal. Therefore, the district court did not prevent Keeler from taking discovery.

extended discovery prior to the court's ruling on summary judgment; (ii) placed the district court on notice that further discovery pertaining to the summary judgment motion was being sought; and (iii) demonstrated to the district court with reasonable specificity how the requested discovery pertained to the pending motion." *Enplanar, Inc. v. Marsh,* 11 F.3d 1284, 1291 (5th Cir. 1994). Keeler fails this test, because it never identified any specific discovery needed to respond to the motion to dismiss.[26] At best, Keeler makes only vague and conclusory assertions that it is entitled to discovery. Accordingly, the district court did not abuse its discretion in declining to grant additional discovery.

C.

Finally, Keeler maintains that the district court erred by not granting leave to amend its complaint.[27] Again, Keeler's

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[26] Inasmuch as we affirm the motion to dismiss based on Keeler's failure to specify that it sought less than $10,000 in monetary damages, we fail to see how any discovery response could have assisted Keeler in opposing the motion.

[27] The district court stated in its November 4, 1992, order that Keeler had never filed a motion to amend, but instead had simply filed the second amended complaint. Keeler asserts on appeal that the motion was sent to the

contention consists of vague and conclusory assertions that it should have been allowed to amend. In the end, it reduces to this: because amendments should be freely granted, the amendment should be granted.

We review a district court's denial of a motion for abuse of discretion. "While 'leave shall be freely given when "justice so requires,' the decision rests in the sound discretion of the trial court.' Ross v. *Houston Independent School District, 699* F.2d 218, 228 (5th Cir. *1983).* Keeler never filed a motion to amend and has never asserted specific reasons why justice ... requires" that the amendment be allowed. It is significant that the case before us now is merely Count VI of Keeler's complaint and that the remaining counts were resolved in the Eastern District of Louisiana and on appeal to this court. The Second Amended Complaint that Keeler sought to file, however, attempted to re-state not only Count VI, but also the other counts, at a time when nearly identical claims were pending in another district

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clerk's office but was "inexplicably not placed in the record." Keeler, however, never attempted to correct this defect in the record by filing a new motion to amend.

court (and then on appeal to this court) in a case between the same parties.[28] If Keeler had been allowed to amend, it would have been pursuing essentially the same claims in two courts at one time, an untenable result. Under these circumstances, we cannot say that the district court abused its discretion in denying the request to file the Second Amended Complaint.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[28] Keeler's motion to supplement the record with the record from that court is DENIED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY

March 12, 1991

MENTZ, J.

ENPLANAR, INC., ET AL	CIVIL ACTION
VERSUS	NUMBER: 91-0101
JOHN MARSH, SECRETARY OF THE ARMY, ET AL	SECTION "I" (1)

Before the Court is the plaintiffs' motion for injunctive relief and supplemental briefs from the parties.[29] After reviewing the motion, memoranda of counsel, the record and the law, the Court hereby denies the motion.

As plaintiffs note in their Memorandum Concerning the Small Business Administration at p. 1, "The 'voluntary'

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[29] By Minute Entry of February 8, 1991, the Court denied plaintiffs' motion for partial summary judgment and ordered the parties to brief whether the SBA was a necessary party to the injunction.

resumption of the 8(a) Program by the Corps of Engineers moots all injunctive relief concerning the 8(a) Program and the declaratory relief involving the Small Business Administration." In fact, plaintiffs and defendants collectively agree that recent developments have mooted the original prayer for injunctive relief.

Accordingly,

IT IS ORDERED that plaintiffs' motion for injunctive relief is DENIED AS MOOT.

Clerk to serve all counsel.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ENPLANAR, INC., V. KEELER & CO., INC., E.J.A., INC., AND DRAGON LIMITED, INC., Plaintiffs	*	CIVIL ACTION
	*	NO. 91-0101
	*	SECTION: I
VERSUS	*	
	*	MAG: 1
JOHN MARSH, ET AL.	*	

ORDER

Considering the foregoing motion for expedited hearing:

IT IS HEREBY ORDERED that in addition to depositions of those individuals that defendants agreed to have taken, plaintiffs may depose Major Green. In all other respects the request for staying discovery until after a ruling on the venue motion shall be granted.

/s/ Ivan J. LeMelle 3/26/91

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ENPLANAR, INC., V. KEELER Plaintiffs	*	CIVIL ACTION
	*	NO. 91-0101
VERSUS	*	
	*	SECTION: I (1)
JOHN MARSH, ET AL.	*	

Order and Reasons

This matter came before the Court on three motions by the defendants:

(1) to dismiss or alternatively for summary judgment;

(2) for change of venue; and

(3) to dismiss amended complaint as to the Corps of Engineers defendants sued in their individual capacities.

By Order of this Court dated March 13, 1991, the Court stated that the motion to dismiss or alternatively for summary judgment would be treated as a motion for summary judgment.

The matter was subsequently taken under submission and the parties were given time to file additional memoranda, the last of which was filed by defendants on June 13, 1991. Therefore, after reviewing the motions, memoranda of counsel, the record and the law, the Court rules as follows for the reasons set forth below.

Introduction

On January 8, 1991, plaintiffs filed their complaint in this case, seeking declaratory and injunctive relief against various defendants, the United States Army ("Army"), the Army Corps of Engineers ("Corps"), the Small Business Administration ("SBA"), and several individual officers in these agencies. The plaintiffs in this case are four businesses certified as participants under the 8(a) program, 15 U.S.C. 637(a), a program designed to help give disadvantaged businesses access to competitive government contract jobs. Two plaintiffs,

Dragon Limited, Inc. and V. Keeler & Co., perform construction work. The other two, E.J.A., Inc. and Enplanar, Inc., provide architectural and engineering services. All four plaintiffs work in the Lower Mississippi Valley Division ("LMVD") of the Corps, primarily within the New Orleans and Vicksburg Districts. The plaintiffs allege that the defendants "suspended" and/or improperly administered the 8(a) program, resulting in discrimination against them.

Discussion

By Order dated February 8, 1991, the Court found the case of Valley Construction Co. v. Marsh, 714 F.2d 26 (5th Cir. 1983), to be the controlling law in this circuit. In that case the Fifth Circuit ruled that injunctive relief was not available against the Army Corps of Engineers because any injunctive relief granted would also affect the SBA. Id. at 29. Injunctive relief against the SBA is statutorily prohibited. See 15 U.S.C.

634(b)(1). In the February 8 Order the Court also directed the parties to brief whether the SBA was a necessary party to this suit. After receiving supplemental briefs from the parties, and noting that the parties collectively agreed that recent developments in the 8(a) program mooted the prayer for injunctive relief, the Court denied plaintiffs' request for injunctive relief.

The Court now finds that with the exception of one plaintiff, V. Keeler & Co., Inc., the factual issues in the complaint are now moot.[30] The crux of the plaintiffs' complaint is that as a result of the Fordice[31] decision the defendants improperly "suspended" or otherwise held in abeyance the awarding of contracts under the 8(a) program. Defendants deny

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[30] And, with respect to Keeler, its claim for injunctive relief is also now moot.

[31] Fordice Construction Co., et al v. Marsh, et al, No. W810028(W) (S.D. Miss. March 14, 1990). The Fordice decision arguably called into question the constitutionality of the 8(a) program.

that the program was ever suspended. However, the defendants admit that they sought guidance from government counsel on the impact of the Fordice decision on the administration of the 8(a) program. The affected period of time in which the 8(a) program was allegedly "suspended" includes November of 1990 through late January of 1991. Plaintiffs concede that the program has been administered appropriately after the Corps received its requested guidance on January 22, 1991. Plaintiffs argue, however, that the three month "suspension" of the 8(a) program was an unjustified pretext for discrimination against them. And, in connection with the subsequent "resumption" of the 8(a) program, plaintiffs contend that they are entitled to attorney's fees as prevailing parties. Plaintiffs also assert that the Corps' withdrawal of certain projects from the 8(a) program discriminated against them. Further, plaintiffs allege that certain Corps officials have denied them access to other Corps

employees and contracting officers since this litigation began, in retaliation for bringing this suit.

The Court finds that there is no genuine issue of material fact left to resolve with respect to whether the plaintiffs, with the possible exception of Keeler, have suffered any harm. They simply have not. First, it is within the discretion of the SBA, not the Corps, to select and certify participants in the 8(a) program. Secondly, it is within the discretion of the Corps as procuring agency to submit or not to submit a certain project to the SBA for inclusion in the 8(a) program. See 15 U.S.C. 637(a); 48 C.F.R. 19.800(b) and 19.803(a)-(c). Likewise, it is in the Corps' discretion to withdraw a project from inclusion in the 8(a) program, particularly where, as here, the contracts had not been awarded. Thirdly, three of the plaintiffs, E.J.A., Dragon, and Enplanar, can show no harm because they only expected to participate in future contract bidding they feared

would be affected by the "suspension" of the 8(a) program. In addition, Enplanar believed that two projects for which it had begun negotiating would be indefinitely postponed due to the "suspension" of the 8(a) program. This type of claim is speculative at best. Additionally, both projects involved "delivery order contracts" in which no expenses are incurred until the Corps, in its discretion, issues a delivery order to the contractor. Enplanar had not, as of the date the suit was filed, received any delivery orders on the subject projects.[32]

In Count II of their amended complaint, the plaintiffs alleged that Col. Stephenson Page and Major Robert Green have denied them access to other employees of the Vicksburg Corps and have deterred the plaintiffs from marketing themselves to the Corps for the purpose of obtaining contracts.

[32] Enplanar was, however, subsequently awarded a contract for drafting services on May 3, 1991.

The Court also finds this claim without merit. The SBA and not the 8(a) program participants is certified to contract as the prime contractor with the procurement agency. The SBA can, in its discretion, authorize the procurement agency to negotiate directly with the 8(a) program participant. "Self-marketing," as these direct communications are called, serve the purpose of acquainting the 8(a) firm with the contracting officers of a procurement agency. However, the selection of a particular 8(a) firm for a contract award at all times remains within the SBA's jurisdiction. See 15 U.S.C. 637 (a)(l)(B). No statute requires self-marketing. Indeed, these marketing activities do not and cannot control which projects are eventually referred to the SBA or which 8(a) firms are awarded contracts. Since plaintiffs can show no substantive right of access to contracting officers with the Corps, we find reasonable the Corps avoidance of direct contract with the plaintiffs during this pending litigation.

See Information Paper dated February 6, 1990 (attachment 2B to Hatcher affidavit) (this Army policy statement discourages contact with 8(a) participants who are involved in pending litigation with the Corps).

As to plaintiffs' claims for attorney's fees as prevailing parties, the Court finds that plaintiffs are not prevailing parties in this matter. Instead, we believe that LMVD's request for guidance following the *Fordice* decision was entirely reasonable, and indeed prudent. And, given the discretion vested in the Corps to decide which projects to submit to the SBA for inclusion in the 8(a) program, the absence of harm to the plaintiffs, and the speculative nature of the plaintiffs' claims, we find that summary judgment is appropriate.

V. Keeler & Co., Inc.

The Corps negotiated with Keeler on the Cotton-Meade Capout project for over fourteen months. However, Keeler's

offers always exceeded established fair market price for the project. On August 28, 1990, the Corps' Vicksburg District notified the SBA that the Cotton-Meade project had been changed in scope and would be redesigned, so that the Corps had decided to withdraw the project from the 8(a) program. On September 8, 1990, the SBA notified Keeler of the Corps' intention. The SBA office in New Orleans notified the Corps of its intention to ask the Corps to reconsider; however, the SBA never sought such reconsideration.

The Court finds that there remain contested issues of material fact with respect to whether the Cotton-Meade project was withdrawn from the 8(a) program in bad faith. Considering the length of time the parties were involved in negotiations, it is conceivable that Keeler could show it was damaged, if it can show that the Corps acted in bad faith in withdrawing the project. However, the Court finds that the government

witnesses, the contracting office, the relevant agency records, the contracting officer, and all circumstances giving rise to Keeler's bad faith claim in Count VI of the amended complaint are located in the Southern District of Mississippi. Keeler's connections to the Eastern District of Louisiana are inconsequential with respect to the bad faith claim. Even the Cotton-Meade project itself is located in the Western District of Louisiana. Therefore, for the convenience of the parties and witnesses, and in the interest of justice, the Court will transfer Count VI of the plaintiffs' amended complaint to the Southern District of Mississippi. 28 U.S.C. § 1404(a); Federal Rule of Civil Procedure 21.

Accordingly, IT IS ORDERED that:

(1) defendants' motion for summary judgment against plaintiffs E.J.A., Inc., Dragon Limited, Inc., and Enplanar, Inc.

is GRANTED, and all claims by these parties against all defendants are hereby DISMISSED WITH PREJUDICE;

(2) defendants' motion for summary judgment against plaintiff V. Keeler & Co., Inc. is GRANTED as to all claims except Count VI of the amended complaint;

(3) defendants' motion for a change of venue is GRANTED, and Count VI of the amended complaint is hereby SEVERED and TRANSFERRED to the Southern District of Mississippi, Jackson Division:

(4) defendants' motion to dismiss the amended complaint as to the Corps of Engineers defendants sued in their individual capacities is GRANTED, and those claims are DISMISSED WITH PREJUDICE; and

(5) the status conference currently set for July 18, 1991 is CANCELLED.

New Orleans, Louisiana, this 15th day of July, 1991.

/s/ HENRY A. MENTZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ENPLANAR, INC., V. KEELER Plaintiffs	*	CIVIL ACTION
	*	NO. 91-0101
VERSUS	*	
	*	SECTION: I (1)
JOHN MARSH, ET AL.	*	

In view of the Court's Order and Reasons entered on July 15, 1991, as well as the remainder of the record in this case, the Court finds that there is no just reason for delay and will therefore direct the Clerk to enter a Rule 54(b) judgment in this matter .

Accordingly,

IT IS ORDERED that the Clerk enter a judgment in favor of all defendants and against all plaintiffs dismissing the plaintiffs' complaint and amended complaint WITH PREJUDICE as to all counts except Count VI of the amended

complaint, that count having been previously ordered transferred to the Southern District of Mississippi.

IT IS FURTHER ORDERED that judgment be entered in favor of Col. Stephenson Page and Major Robert Green in their individual capacities and against all plaintiffs dismissing their complaint and amended complaint against Page and Green in their individual capacities WITH PREJUDICE.

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Clerk to serve all counsel.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ENPLANAR, INC., V. KEELER Plaintiffs	*	CIVIL ACTION
	*	NO. 91-0101
VERSUS	*	
	*	SECTION: I (1)
JOHN MARSH, ET AL.	*	

RULE 54(b) JUDGMENT

Considering the Court's Minute Entry entered herein on July 25, 1991,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, John Marsh, in his official capacity as Secretary of the Army of the United States, Robert W. Page, in his official capacity as Army Assistant Secretary, Civil Works, Henry Hatch, Lieutenant General, in his official capacity as Chief of Engineers, Stephenson W. Page, Colonel, in his official capacity as District Engineer, U. S. Army, Susan Engeleiter, in her official capacity as Administrator, Small Business Administration, Small Business Administration, United States, Robert Gorski, Colonel, in his official capacity as District Engineer, U. S. Army, and Corp. of

Engineers, U. S. Army, and against plaintiffs, Enplanar, Inc., V. Keeler & Company, Inc., E. J. A., Inc. and Dragon Limited, Inc., **dismissing** said plaintiffs' Complaint and Amended Complaint **with prejudice** as to all Counts, except Count VI of the Amended Complaint, that Count having been previously ordered transferred to the Southern District of Mississippi.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Stephenson W. Page, Colonel, in his individual capacity, and Robert Green, Major, in his individual capacity, and against plaintiffs, Enplanar, Inc., V. Keeler & Company, Inc., E. J. A., Inc. and Dragon Limited, Inc. **dismissing** said plaintiffs' Complaint and Amended Complaint **with prejudice**.

New Orleans, Louisiana, this 29th day of July, 1991.

/s/ HENRY A. MENTZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Minute Entry August 28, 1991 Mentz, J.

ENPLANAR, INC., V. KEELER Plaintiffs	*	CIVIL ACTION
	*	NO. 91-0101
VERSUS	*	
	*	SECTION: I (1)
JOHN MARSH, ET AL.	*	

This Court has reviewed the law applicable to this case, as well as the briefs of counsel, in considering Plaintiffs' Motion for Reconsideration. This Court finds no error in its prior rulings, and further finds that said Motion is without merit for the reasons set out in the Order and Reasons of July 15, 1991 (entered July 17, 1991); the Minute Entry of July 25, 1991, and the Judgment of July 30, 1991.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Reconsideration of Orders and Judgment of Dismissal and Transfer is DENIED and the hearing set for August 28, 1991 is CANCELLED.

Clerk to serve all counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ENPLANAR, INC., V. KEELER & CO., INC. E.J.A., INC., AND DRAGON LIMITED, INC. — PLAINTIFFS

VERSUS — CIVIL ACTION NO. J91-0413(R)

JOHN MARSH, SECRETARY OF THE ARMY OF THE UNITED STATES; ROBERT W. PAGE AS ARMY ASSISTANT SECRETARY, CIVIL WORKS; LIEUTENANT GENERAL HENRY HATCH, IN HIS OFFICIAL CAPACITY AS CHIEF OF ENGINEERS; COLONEL RICHARD B. GORSKI, IN HIS OFFICIAL CAPACITY AS DISTRICT ENGINEER, U.S. ARMY; COLONEL STEPHENSON W. PAGE, IN HIS OFFICIAL CAPACITY AS DISTRICT ENGINEER, U.S. ARMY; UNITED STATES ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; SUSAN ENGELEITER, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; AND UNITED STATES SMALL BUSINESS ADMINISTRATION DEFENDANTS

MEMORANDUM ORDER

This cause is before this Court on Motion of the defendants John Marsh, Secretary of the Army of the United

States; Robert W. Page as Army Assistant Secretary, Civil Works; Lieutenant General Henry Hatch, in his official capacity as Chief of Engineers; Colonel Richard B. Gorski, in his official capacity as District Engineer, U.S. Army; Colonel Stephenson W. Page, in his official capacity as District Engineer, U.S. Army; United States Army; United States Army Corps of Engineers; Susan Engeleiter, Administrator, Small Business Administration; and United States Small Business Administration, to enter an Order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing Count VI of the Amended Complaint for the failure of the plaintiff, V. Keeler & Co. (hereinafter "Keeler") to invoke this Court's subject matter jurisdiction by pleading that the prayer for money damages on the contract claim contained in Count VI does not exceed the jurisdictional amount required by 28 U.S.C. Section 1345(a)(2) (hereinafter the "Tucker Act").

Also pending before this Court is the Motion of the defendants to Stay Discovery, and a proposed Order (without a motion) of the plaintiff to File Second Amended Complaint.

I. INTRODUCTION

A. Procedural History

This lawsuit was filed on January 8, 1991, in the United States District Court for the Eastern District of Louisiana by four certified participants in the 8(a) program (15 U.S.C. Section 637(a)) who performed or were prepared to perform 8(a) contracts in the New Orleans and Vicksburg districts of the United States Army Corps of Engineers. The complaint and first amended complaint sought declaratory and injunctive relief against the Army, the Army Corps of Engineers, the Small Business Administration (hereinafter the "SBA") and several individual agency officers. The amended complaint alleged that certain named defendants had engaged in unlawful

discrimination by: (1) suspending and improperly administering the 8(a) program; (2) withdrawing certain projects from the 8(a) program; and (3) preventing plaintiffs' access to Corps contracting personnel.

In March, 1991, the defendants filed a motion to dismiss, or, in the alternative, for summary judgment. The defendants maintained that there had been: (1) no suspension of the 8(a) program; and (2) no harm to plaintiffs resulting from the Corps of Engineers' seeking guidance as to the administration of the 8(a) program following the government's dismissal of the appeal of the then recent *Fordice Construction Co. v. Marsh, et al.*, No. W810028(W) (S.D. Miss., April 30, 1990).[33] The defendants also filed simultaneously a motion for change of venue, which contended that the plaintiffs' claim for review of

[33] In *Fordice Construction Co. v. Marsh*, the court held that defendants, including the SBA and the Vicksburg District of the Corps of Engineers, had improperly administered certain aspects of the 8(a) program.

the Corps' actions regarding the only disputed Vicksburg District project, the Cotton-Meade Cap-Out (identified in Count VI), was not related to the alleged suspension of the 8(a) program but was a veiled request for administrative review and money damages. The defendants argued that Count VI, therefore, should be transferred to the Southern District of Mississippi, which has more significant contacts with the subject matter of Count VI.

The district court had previously denied plaintiffs' claims for injunctive relief because it found those claims were: (1) prohibited by statute and controlling Fifth Circuit precedent; and (2) mooted by the defendants' continued administration of the 8(a) program. On July 15, 1991, the district court granted defendants' motions to dismiss, for summary judgment, and to transfer Count VI and concluded that: (1) plaintiffs (with the possible exception of the V. Keeler Company) were not harmed

by the Corps' administration of the 8(a) program and entered summary judgment against all plaintiffs except V. Keeler (Count VI); (2) plaintiffs had no substantive right of access to Corps' contracting personnel and granted defendants' motion to dismiss the defendants named in their individual capacities; (3) the defendants' request for guidance following the Fordice decision was reasonable and rejected plaintiffs' request for attorneys fees as prevailing parties; and (4) Count VI of the amended Complaint (requesting administrative review of the Corps' decision to withdraw the Vicksburg District project (the Cotton-Meade Cap-Out) from the 8(a) program) lacked significant contacts with the Eastern District of Louisiana and granted the defendants' Motion to transfer Count VI, pursuant to rule 21 of the Federal Rules of Civil Procedure.

B. Count VI of the Amended Complaint.

Presently before this Court is Count VI of the amended Complaint which is a claim grounded in contract asserted by the plaintiff, Keeler, against the Corps of Engineers and the Vicksburg District of the Corps. Said count concerns the defendants' withdrawal of a certain project, the Cotton-Meade Cap-Out, from possible performance through the 8(a) program. The defendants submit that the withdrawal was based on defendants' administrative analysis and judgment that the scope of the project had changed because certain conditions (including the-weather, river flow, and the integrity of existing structures) had changed since the time that negotiations for possible award had begun. It is because plaintiff disagrees with defendants' administrative decision withdrawing the Cotton-Meade Cap-Out project from the 8(a) program that the amended complaint alleges the project was withdrawn from

possible 8(a) performance in bad faith. As such, Count VI requests relief in the form of unspecified monetary damages.

II. ARGUMENT

Count VI of the amended complaint, as transferred to this Court, asks the Court to conduct an administrative review of plaintiff Keeler's contract claim and to enter unspecified monetary damages in its favor and against defendants. Defendants are therefore entitled to the dismissal of Count VI because: (1) the contract claim as alleged is only cognizable under the Tucker Act; and (2) plaintiff Keeler has failed to invoke this Court's subject matter jurisdiction by pleading that its Tucker Act claim does not exceed the $10,000.00 limitation placed on this Court's subject matter jurisdiction for such claims.

The plaintiff Keeler contends that the issue of lack of subject matter jurisdiction was not raised by motion by the

defendants in the U.S. District Court, Eastern District of Louisiana, under circumstances in which such motion may have impacted on the decision of the court on whether or not to have granted the motion for change of venue. Further, the plaintiff submits that there was never any challenge of the jurisdiction of the district court until after the 8(a) program was reinstated, until Keeler's request for pre-award injunctive relief was denied, and until the remainder of this case was transferred to this Court.

The plaintiffs contends that because the defendants are raising the issue of lack of subject matter jurisdiction, that they are varying with the long-standing rule in federal court that jurisdiction is determined at the time the suit is filed and, after vesting, cannot be ousted by subsequent events, including action of the parties. *Citing F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983).

A. The Tucker Act

As explained in defendants' Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction, Count VI of the amended complaint alleges that Keeler was disappointed when its contract negotiations with the Corps' Vicksburg District for the Cotton-Meade project were discontinued and the Cotton-Meade contract was subsequently awarded to another company. Keeler asks the Court to conduct an administrative review of its claim that it was entitled to the contract for the Cotton-Meade project and requests the award of unspecified monetary damages. Despite its request for specific performance of the Cotton-Meade contract, Keeler has failed to identify the amount of the contract damages it seeks. Thus, Keeler has not met its threshold burden of demonstrating that the $10,000.00 jurisdictional requirement set forth in the Tucker Act has been satisfied.

It is established that the United States, as sovereign, is immune from suit except according to the terms of specific waivers of that immunity. The Tucker Act, 28 U.S.C. Section 1346, waives the sovereign immunity of the United States for contract and nontort claims. The Act provides concurrent jurisdiction in the district courts and the claims court for contract claims involving damages of $10,000.00 or less; contract claims for damages of more than $10,000.00 are within the exclusive jurisdiction of the claims court. Plaintiffs [sic] seeks to invoke the subject matter jurisdiction of the federal district courts bear the burden of alleging that their claims do not exceed the $10,000.00 jurisdictional limit established by the Tucker Act. See *New Mexico v. Regan*, 745 F.2d 1318, 1332 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (198S); *Clark v. United States*, 691 F.2d 837, 840 (7th Cir. 1982); *Ware v. United States*; 626 F.2d 1278, 1286 (5th Cir.

1980). See generally Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* Sections 1214, 3657 and notes 29-31 (1985 & Supp.).

At the oral argument held in this cause on February 27, 1992, this Court specifically directed plaintiff's counsel to address two issues fundamental to this litigation.

First, the Court directed plaintiff to explain how its request for monetary damages was consistent with the jurisdictional requirements of the Tucker Act. Second, the Court directed plaintiff to articulate a basis for the injunctive relief requested in the amended complaint and to explain how that request for injunctive relief could be reconciled with the Fifth Circuit's general prohibition against injunctive relief in cases, such as this one, involving the Small Business Administration. *See Valley Construction Co. v. Marsh*, 714 F.2d 26 (5th Cir. 1983).

Plaintiff has not sufficiently responded to the merits of defendants' motion to dismiss. In its response to the motion to dismiss, Keeler fails to provide any explanation of a damage calculation that would not violate the requirements of the Tucker Act which is fundamental to this jurisdictional issue. Instead, Keeler's response to defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction repeatedly raises irrelevant issues[34] that have already been ruled on in this litigation by Judge Mentz in the Eastern District of Louisiana and that are now on appeal in the Fifth Circuit of Appeals. *See Enplanar v. Marsh et al.*, Order and Reasons (No. 91-0101; E.D.La. July 17, 1991). Keeler also attempts to resurrect its defective claims for injunctive relief which is unavailable from this Court

[34] For example, Keeler again raises the claims that it was prevented from self-marketing with the Corps' Vicksburg District and that the 8(a) program was allegedly suspended in the Corps' Vicksburg and New Orleans Districts.

because such relief is forbidden by the controlling law of this Circuit. *Valley Construction Co. v. Marsh*, 714 F.2d 26 (5th Cir. 1983). Second, injunctive relief is unavailable where, as here, it represents merely a veiled request for otherwise unavailable money damages. *See B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 727 (2d Cir. 1983).

B. The Unavailability of Injunctive Relief

Both the amended complaint and plaintiff's supplemental memorandum in opposition to the Motion to Dismiss resurrect Keeler's request for injunctive relief. That injunctive relief includes specific performance of the contract for the Cotton-Meade project. Plaintiff's Supplemental Memo at 14. At oral argument, on February 22, 1992, defendants represented to the Court that the Fifth Circuit's general prohibition against the award of injunctive relief in cases implicating the Small

Business Administration or its programs barred the award of injunctive relief or specific performance in this case.

Valley Construction Co. v. Marsh, 714 F.2d 26 (5th Cir. 1983), is the most recent in a consistent line of Fifth Circuit cases that explicitly deny requests for injunctive relief against the SBA and other federal agencies participating in the administration of the Section 8(a) program. *See also, Romeo v. United States*, 462 F.2d 1036 (5th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *Expedient Services, Inc. v. Weaver*, 614 F.2d 56 (5th Cir. 1980). The *Valley* court specifically determined that 15 U.S.C. Section 634(b)(1) prohibits injunctive relief against either the SBA or the Corps in the administration of the Section 8(a) program.

> We concur with the reasoning of the district court and will not allow the contractors to obtain indirectly (against the Army) what they cannot obtain directly (against the SBA). Jets Services, Inc. v. Hoffman, 420 F.Supp. 1300, 1309 (M.D. Fla. 1976) (minority set aside against the Army). We therefore affirm the dismissal of the claim to injunctive relief.

714 F.2d at 29. Early on in this litigation Judge Mentz found *Valley Construction* to be controlling law in the Fifth Circuit. Order of February 8, 1991. See Order and Reasons, July 15, 1992 at 2. The injunctive relief Keeler seeks in the amended complaint (as well as the "Second Amended Complaint") is simply not available as a matter of law.

Finally, at the conclusion of oral argument, this Court inquired about Keeler's ability to perform a contract, such as Cotton-Meade, in the event that injunctive relief was not barred under the facts and the law of this case. Keeler has not [sic for now] acknowledged that it has ceased all business operations and does not contend that it is capable of performing construction contracts of any kind. Plaintiff's Supplemental Memo at 6. Thus, even if injunctive relief were available, such relief would be meaningless in this situation and Keeler's request for such relief amounts to no more than a thinly veiled

demand for money damages which Keeler cannot obtain because it has failed to satisfy the jurisdictional requirements of the Tucker Act.

III. CONCLUSION

IT IS, THEREFORE, ORDERED AND ADJUDGED, that for the foregoing reasons, the Court is of the opinion that the Motion of the defendants to Dismiss Count VI of the Amended Complaint for lack of subject matter jurisdiction, is well taken and hereby GRANTED; and the Motion of the defendants to Stay Discovery is hereby MOOT.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff's proposed Order to File Second Amended Complaint is hereby DENIED.

SO ORDERED AND ADJUDGED this the 3rd day of Nov. 1992.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ENPLANAR, INC., V. KEELER & CO., INC. E.J.A., INC., AND DRAGON LIMITED, INC. PLAINTIFFS

VERSUS CIVIL ACTION NO. J91-0413(R)

JOHN MARSH, SECRETARY OF THE ARMY OF THE UNITED STATES; ROBERT W. PAGE AS ARMY ASSISTANT SECRETARY, CIVIL WORKS; LIEUTENANT GENERAL HENRY HATCH, IN HIS OFFICIAL CAPACITY AS CHIEF OF ENGINEERS; COLONEL RICHARD B. GORSKI, IN HIS OFFICIAL CAPACITY AS DISTRICT ENGINEER, U.S. ARMY; COLONEL STEPHENSON W. PAGE, IN HIS OFFICIAL CAPACITY AS DISTRICT ENGINEER, U.S. ARMY; UNITED STATES ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; SUSAN ENGELEITER, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; AND UNITED STATES SMALL BUSINESS ADMINISTRATION DEFENDANTS

FINAL ORDER

This matter is before the Court on Defendants' Motion to Dismiss Count VI of the Amended Complaint for Lack of Subject Matter Jurisdiction. Also before the Court is Plaintiff's proposed Order, without a motion, to file a second amended complaint. Having considered Defendants' motion and the briefs in support and in opposition to the motion, it is hereby ORDERED and ADJUDGED that Defendants' Motion to Dismiss Count VI of the Amended Complaint for Lack of Subject Matter Jurisdiction is GRANTED. It is further ORDERED and ADJUDGED that Plaintiff's proposed order to file a second amended complaint is DENIED.

So ORDERED AND ADJUDGED this 5th day of August, 1993.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ENPLANAR, INC., V. KEELER & CO., INC. E.J.A., INC., AND DRAGON LIMITED, INC. PLAINTIFFS

VERSUS CIVIL ACTION NO. J91-0413(R)

JOHN MARSH, SECRETARY OF THE ARMY OF THE UNITED STATES; ROBERT W. PAGE AS ARMY ASSISTANT SECRETARY, CIVIL WORKS; LIEUTENANT GENERAL HENRY HATCH, IN HIS OFFICIAL CAPACITY AS CHIEF OF ENGINEERS; COLONEL RICHARD B. GORSKI, IN HIS OFFICIAL CAPACITY AS DISTRICT ENGINEER, U.S. ARMY; COLONEL STEPHENSON W. PAGE, IN HIS OFFICIAL CAPACITY AS DISTRICT ENGINEER, U.S. ARMY; UNITED STATES ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; SUSAN ENGELEITER, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; AND UNITED STATES SMALL BUSINESS ADMINISTRATION DEFENDANTS

MEMORANDUM ORDER

This cause is before this Court on "Motion of the plaintiff, Jean H. Turner, Trustee of the estate of V. Keeler & Co., Inc.,

for Reconsideration of this Court's Judgment of August 5, 1993, dismissing Count VI of the Amended Complaint for lack of subject matter jurisdiction and denying 'the plaintiff's proposed Order to file Second Amended Complaint.'"

On January 29, 1992, defendants filed a Motion to Dismiss Count VI of the amended complaint for lack of subject matter jurisdiction because the plaintiff, V. Keeler & Co., Inc. (hereinafter "Keeler"), failed to meet its burden of demonstrating that its contract claim for unspecified money damages did not exceed the $10,000.00 jurisdictional limit established by the Tucker Act. 28 U.S.C. Section 1346. *See State of New Mexico v. Regan*, 745 F.2d 1318, 1332 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); *Clark v. United States*, 691 F.2d 837, 840 (7th Cir. 1982); *Ware v. United States*; 626 F.2d 1278, 1286 (5th Cir. 1980). See generally Wright, Miller & Cooper, *Federal Practice and Procedure:*

Jurisdiction 2d Sections 1214, 3657 and notes 29-31 (1985 & Supp.).

In a Memorandum Order filed on November 4, 1992, and a final Order filed on August 6, 1993, this Court granted defendants' Motion to Dismiss Count VI of the amended complaint and denied plaintiff's Motion to Amend because plaintiff failed to meet its burden of demonstrating it could meet the jurisdictional burden set by the Tucker Act. Moreover, this Court specifically noted in its Memorandum Order that plaintiff has avoided, at every opportunity, any articulation of any claim for money damages that would not violate the requirements of the Tucker Act. Even when pressed on that very issue by this Court at oral argument on February 27, 1992, plaintiff's counsel avoided making any substantive response.

See Order at 7-8.[35] Plaintiff follows that same pattern in its current motion.

In its Motion for Reconsideration,[36] plaintiff once again urges the Court to reverse its findings regarding subject matter jurisdiction in this case and to allow it to file a second amended complaint. Nevertheless, plaintiff once again fails to articulate

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[35] During the course of this litigation this Court concluded that plaintiff's request for injunctive relief was precluded by the Fifth Circuit's general prohibition against injunctive relief in cases, such as this one, involving the Small Business Administration. *See* Order at 9-10, citing *Valley Construction Co. v. Marsh*, 714 F.2d 26 (5th Cir. 1983). Accordingly, plaintiff may not proffer an amended complaint which requests injunctive relief against these defendants.

[36] 2 Plaintiff's Motion for Reconsideration fails to cite the Federal Rule of Civil Procedure under which its Motion is brought, including Federal Rule 60. Plaintiff's Motion for Reconsideration suggests that because certain documents were not filed by the Clerk of Court, plaintiff's motion to file a second amended complaint was not fully argued by defendants and considered by the Court. This is simply not the case. The second amended Complaint was filed with the Court on April 2, 1992. This Court considered said proposed Complaint and defendant's response in its reply brief in support of their original Motion to Dismiss filed with this Court. This Court, thereafter, denied the plaintiff's proposed order to file second amended Complaint on November 3, 1992. All of the reasons defendants raised in opposition to Count VI of the amended complaint had transferred from the Eastern District of Louisiana and applied with equal force to plaintiff's so-called second amended Complaint.

any substantive basis for the filing of such an amendment and once again fails to meet its threshold burden of demonstrating that Keeler can meet the $10,000 jurisdictional requirement set forth in the Tucker Act and explained in this Court's Memorandum Order of November 4, 1992.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion of the plaintiff for Reconsideration is hereby DENIED.

SO ORDERED AND ADJUDGED this the 13th day of Sept. 1993.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

19 F.3d 17

DENIALS OF REHEARING EN BANC

The Petitions for Rehearing are DENIED and no member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

Title	Docket Number	Date of Denial	Citation of Panel Decision
Enplanar, Inc. v. Marsh	91-3837	3/14/94	E.D. La. 11 F.3d 1284

Supreme Court, U.S.
FILED
SEP 15 1994
OFFICE OF THE CLERK

No. 93-2053

In the Supreme Court of the United States

OCTOBER TERM, 1994

ENPLANAR, INC., ET AL., PETITIONERS

v.

TOGO WEST, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' request for an injunction directing the Army Corps of Engineers to award particular contracts to them under Section 8(a) of the Small Business Act, 15 U.S.C. 637(a) (1988 & Supp. IV 1992), is precluded by 15 U.S.C. 634(b)(1).

2. Whether the district court lacked jurisdiction over petitioners' claim against the Corps for an unspecified amount of monetary damages.

3. Whether the district court committed a series of procedural errors that violated procedural due process.

4. Whether the Corps' suspension of its Section 8(a) program deprived petitioners of property without due process of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2053

ENPLANAR, INC., ET AL., PETITIONERS

v.

TOGO WEST, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. A1-A41) is reported at 11 F.3d 1284. The second opinion of the court of appeals (Pet. App. A42-A51) is unreported. The opinions and orders of the district court (Pet. App. A52-A95) are not yet reported.

JURISDICTION

The first judgment of the court of appeals was entered on January 19, 1994. A petition for rehearing was denied on March 14, 1994. Pet. App. A96. The second judgment of the court of appeals was entered on June 2, 1994. The petition for a writ of certiorari was filed on June 13, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to the way in which the Army Corps of Engineers has administered its program for assisting socially and economically disadvantaged businesses in obtaining government contracts under Section 8(a) of the Small Business Act, 15 U.S.C. 637(a)(1988 & Supp. IV 1992). Initially, the Corps employed a practice of setting aside 100% of its small business contracts for minority businesses. In November, 1990, a group of nonminority contractors successfully challenged that practice. The Corps then sought legal advice from Army Headquarters concerning the overall legality of the Section 8(a) program. While awaiting that advice, the Corps refrained from awarding any new contracts under the program. On January 22, 1994, the Corps received advice from Army Headquarters that, while the 100% set aside was erroneous, there was no legal impediment to awarding contracts under the Section 8(a) program. The Corps then lifted its suspension of the program. Pet. App. A4-A6.

Meanwhile, on January 8, 1991, petitioners EJA, Enplanar, Dragon, and Keeler filed suit in the United States District Court for the Eastern District of Louisiana against the Corps, its officials, and the Small Business Administration (SBA). At the time they filed suit, petitioners were certified participants in the Section 8(a) program. Petitioners, who are minority contractors, alleged that the Corps' suspension of the Section 8(a) program discriminated against them on the basis of race, in violation of 42 U.S.C. 1981, 1985(3), and 2000d, and also constituted a taking of property without due process. Pet. App. A7. Petitioners also specifically challenged the Corps' failure to include the Southwest Pass project in Louisiana and the Cotton Meade project

in Mississippi in the Section 8(a) program. Petitioners sought declaratory and injunctive relief, including an injunction lifting the suspension of the Section 8(a) program and directing the Corps to award the Southwest Pass project to EJA and the Cotton Meade project to Keeler. Pet. App. A7-A8. Petitioner Keeler also sought an unspecified amount of damages resulting from its failure to receive the Cotton Meade project. *Id.* at A79.

The district court issued a preliminary ruling that injunctive relief was not available against the Corps because an injunction against the Corps would affect the SBA and injunctive relief against the SBA is precluded by 15 U.S.C. 634(b)(1). The court later determined that the Corps' resumption of its Section 8(a) program had mooted all claims for injunctive relief. Pet. App. A57-A58.

At that point, the government moved to transfer Keeler's claim concerning the Cotton Meade project to the Southern District of Mississippi and for summary judgment on all other claims. Petitioners then filed an amended complaint against two Corps officials alleging that their refusal to meet with petitioners during the pendency of the suit constituted unconstitutional retaliation. The government filed a supplemental memorandum addressing that claim. In accordance with the government's motion, the district court granted summary judgment against petitioners on all claims except Keeler's claim concerning the Cotton Meade project. The court transferred that claim to the Southern District of Mississippi. Pet. App. A9-A10.

The court of appeals affirmed. Pet. App. A1-A41. The court held that the district court had properly denied petitioners' request for an injunction directing the Corps to award the Southeast Pass and Cotton Meade projects to EJA and Keeler. The court explained that 15

U.S.C. 634(b) "precludes injunctive relief against the SBA," and that "[w]e . . . will not allow the contractors to obtain indirectly (against the Army) what they cannot obtain directly (against the SBA)." Pet. App. A12 (quoting *Valley Constr. Co.* v. *Marsh*, 714 F.2d 26, 29 (5th Cir. 1983)). The court added that "[i]f a court ordered the Corps to award these projects to specific 8(a) participants, this order would also require injunctive relief concerning the SBA's conduct as to its statutory duties regarding its selection of 8(a) contractors for a specific project, and its subsequent negotiations with a procurement agency concerning the terms of the project's contract." Pet. App. A12 n.5.

The court further held that EJA was not entitled to injunctive relief because it "no longer exists, and therefore it cannot perform the contract." Pet. App. A14 n.7. The court also concluded that EJA was not entitled to "money damages in lieu of the injunctive relief" because "[t]o allow such a result would destroy the distinction between monetary and equitable damages." *Ibid.* Moreover, "since EJA's claim concerning the Southwest Pass project names only the Corps and its divisions as defendants, it is thereby suing only the United States." *Ibid.* Such a monetary claim against the United States, the court held, should have been brought in the Court of Federal Claims. *Ibid.*

The court next rejected petitioners' contention that they were improperly denied discovery on their non-injunctive claims. The court found that petitioners had failed to explain how their requested discovery "would or could create a fact issue to overcome the * * * summary judgment motion." Pet. App. A20. The court also rejected petitioners' claim that they had lacked notice that the government was seeking summary judgment on the retaliation claim. The court noted that the govern-

ment's supplemental memorandum had, in fact, specifically addressed that claim. *Id.* at A21-A22.

The court then held that summary judgment was properly granted on the non-injunctive claims. The court found that the Corps had suspended the Section 8(a) program out of a concern that it might be unconstitutional. The court concluded that petitioners had failed to produce evidence "that the [Corps'] proffered reasons were a mere pretext for discrimination." Pet. App. A28-A29. The court also concluded that evidence that the Corps did not include Southwest Pass project in the Section 8(a) program because it "feared that too many of its small business set-asides were going into the 8(a) program" was insufficient to show "that the Corps' decision not to submit the project was based on a discriminatory intent." *Id.* at A31 n.14.

Finally, the court determined that the contracting officers' refusal to speak to petitioners during the pendency of the suit was not intended to "punish them for having brought suit." Pet. App. A35. Instead, the court found that the Army's General Counsel had directed the officers not to speak with petitioners so as not to give them "any ammunition to weaken the Government's [litigation] position." *Ibid.* Although petitioners attacked as hearsay the evidence that the officials had relied on such instructions, petitioners did not raise that objection in the district court. *Id.* at A35 n.17. Accordingly, the court concluded that "the error, if any, is waived." *Ibid.*

2. While petitioners' appeal was pending in the Fifth Circuit, the District Court for the Southern District of Mississippi dismissed Keeler's claim for unspecified money damages related to the Cotton Meade project. Pet. App. A77-A85. The court noted that, while the Tucker Act gives district courts jurisdiction of claims

against the United States for $10,000 or less, the Court of Federal Claims has exclusive jurisdiction of claims for more than $10,000. Pet. App. A82. Because plaintiffs bear the burden of establishing jurisdiction and Keeler had failed to specify the amount of its damages, the court concluded that it lacked jurisdiction over Keeler's claim. *Id.* at A82-A84.

The district court also denied Keeler leave to file a second amended complaint seeking injunctive relief. The court held that such relief is precluded by 15 U.S.C. 634(b)(1). The court also determined that such relief "would be meaningless" since Keeler "has no[w] acknowledged that it has ceased all business operations and does not contend that it is capable of performing construction contracts of any kind." Pet. App. A87.

The court of appeals affirmed. Pet. App. A42-A51. It held that the district court properly dismissed Keeler's claim for monetary damages for lack of jurisdiction. *Id.* at A45-A48. Because petitioner had failed to specify the amount of its damages, the court held, the district court lacked jurisdiction under the Tucker Act. Nor was jurisdiction available under 15 U.S.C. 634(b) or 5 U.S.C. 702. The court noted that "15 U.S.C. 634(b) provides jurisdiction for claims against the Small Business Administration, an entity which is not a defendant here." Pet. App. A47. Section 702 did not provide jurisdiction, the court held, because Keeler made no claim under the Administrative Procedure Act and because Section 702 does not authorize monetary damages. Pet. App. A47-A48.

The court also rejected Keeler's contention that the district court erred in denying its request for additional discovery. The court explained that Keeler had "never identified any specific discovery needed to respond to the motion to dismiss." Pet. App. A49. Finally, the court

concluded that the district court did not abuse its discretion in refusing to allow Keeler leave to amend its complaint. The court noted that the claims in Keeler's amended complaint were "nearly identical" to the claims it had unsuccessfully litigated in the Eastern District of Louisiana. *Id.* at A49-A51.

ARGUMENT

1. Petitioners contend (Pet. 19-22) that the court of appeals erred in concluding that 15 U.S.C. 634 precluded their request for an injunction requiring the Corps to award the Southwest Pass project to EJA and the Cotton Meade project to Keeler. Section 634 expressly provides, however, that "no attachment, *injunction*, garnishment, or other similar process, mesne or final, shall be issued against the Administrator [of the Small Business Administration]." 15 U.S.C. 634(b)(1) (emphasis added). Although petitioners sought an injunction against the Corps and not the SBA, the court of appeals concluded that Section 634 did not permit petitioners to obtain indirectly against the Corps what they could not obtain directly against the SBA. Pet. App. A12. The court also concluded that if petitioners were to obtain an injunction against the Corps, "this order would also require injunctive relief concerning the SBA's conduct." *Id.* at A12 n.5.

Petitioners contend (Pet. 17, 19-21) that the court's holding that Section 634 precluded their claim for injunctive relief is inconsistent with the decisions in *Cavalier Clothes, Inc.* v. *United States*, 810 F.2d 1108, 1112 (Fed. Cir. 1987), *Ulstein Maritime, Ltd.* v. *United States*, 833 F.2d 1052, 1057 (1st Cir. 1987), and *Oklahoma Aerotronics* v. *United States*, 661 F.2d 976, 977 (D.C. Cir. 1981). There is, however, no conflict warranting this Court's review.

In *Cavalier Clothes*, the Federal Circuit held that the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 40, authorizes injunctive relief against the SBA. 810 F.2d at 1112. That Act, however, only applies to cases brought in the Court of Claims. 28 U.S.C. 1491(a)(1) (1988 & Supp. 1992). In *Ulstein Maritime, Ltd.*, plaintiffs sought an injunction against the Navy rather than the SBA. The court held that, given the particular issue involved in that case, interpreting Section 634(b)(1) to preclude such relief would have rendered a provision in the Walsh-Healy Act meaning-less. 833 F.2d at 1055. The court's further conclusion (*id.* at 1056-1058) that Section 634 does not preclude an injunction against the SBA in all circumstances was therefore unnecessary to its decision. Finally, in *Oklahoma Aerotronics*, the D.C. Circuit held that because plaintiffs were simply seeking a determination that the SBA's conduct was arbitrary and capricious under the Administrative Procedure Act, the argument that Section 634 precludes injunctive relief against the SBA was "irrelevant." 661 F.2d at 977.

In any event, the question whether Section 634 precluded the injunctive relief sought by petitioners is no longer presented. Petitioners EJA and Keeler are out of business and unable to perform any contracts. Pet. App. A14 n.7, A87-A89. Moreover, the Southwest Pass and Cotton Meade projects have been fully performed. Pet. 3, 17. In those circumstances, petitioners' request for injunctive relief is moot. See *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983) (mootness doctrine requires a litigant to have "suffered some actual injury that can be redressed by a favorable judicial decision").

2. Petitioners argue (Pet. 22-25) that the court of appeals erred in concluding that the district court lacked

jurisdiction over their claims for unspecified monetary damages. As the court of appeals concluded, however, the Tucker Act only provides district courts with jurisdiction of claims against the United States for $10,000 or less. The Court of Federal Claims has exclusive jurisdiction of claims under the Tucker Act for more than $10,000. 28 U.S.C. 1346(a)(2), 1491(a). Because petitioners did not allege that their losses amounted to $10,000 or less, the district court lacked jurisdiction under the Tucker Act.

Petitioners contend that because they had "an alternative method of obtaining jurisdiction and waiver of sovereign immunity," they should not have been remitted to the Court of Federal Claims. Pet. 22. Petitioners do not specify, however, what that alternative source of district court jurisdiction is. In the court of appeals, petitioners relied on 15 U.S.C. 634(b) and 5 U.S.C. 702 for that purpose. As the court of appeals concluded, however, neither of those provisions is applicable here. Section 634(b) provides jurisdiction over claims against the SBA, but petitioners seek damages from the Corps, not from the SBA. Waivers of sovereign immunity must be narrowly construed and apply only to suits against the specific entity whose immunity is waived. See *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). And because the Administrative Procedure Act does not authorize a claim for monetary damages, 5 U.S.C. 702 is also inapplicable. Pet. App. A47-A48.

Petitioners' inability to establish a source of jurisdiction for their claim other than the Tucker Act distinguishes this case from the cases upon which they rely. See Pet. 23-25. For example, in *Munoz* v. *SBA*, 644 F.2d 1361, 1364 (9th Cir. 1981), plaintiffs sought monetary relief from the SBA. The district court there-

fore had jurisdiction under Section 634(b). In *Bowen* v. *Massachusetts*, 487 U.S. 879, 887, 893 (1988), plaintiffs asserted a claim under the Administrative Procedure Act and did not seek monetary damages. The district court therefore had jurisdiction under 5 U.S.C. 702. 487 U.S. at 910 & n.48. Because plaintiffs are unable to identify a source of jurisdiction for their claim other than the Tucker Act, *Munoz* and *Bowen* (as well as all the other cases relied upon by petitioners) are inapposite.

3. Petitioners' contention (Pet. 26-35) that the district court committed a series of procedural errors that denied them due process of law is also without merit. Petitioners argue that the district court improperly denied them discovery. Pet. 26-27. But, as the court of appeals concluded, petitioners never explained to the district court how the discovery they sought would assist them in answering the government's dispositive motions. Pet. App. A20, A49. Although petitioners assert (Pet. 28) that they never received notice of the government's motion for summary judgment on their first amended complaint, the government's supplemental memorandum in support of its motion for summary judgment provided petitioners with ample notice. Pet. App. A21-A22. Petitioners' contention that the district court improperly relied on hearsay in granting summary judgment on their retaliation claim (Pet. 29-30) was not raised in the district court. The court of appeals therefore correctly concluded that petitioners had waived the objection. Pet. App. A35 n.17. Finally, while petitioners fault the Mississippi district court for failing to grant Keeler's motion to amend its complaint (Pet. 34-35), the claims in the proposed amendment were nearly identical to the

claims that petitioners had litigated unsuccessfully in Louisiana. Pet. App. A49-A51.

4. Finally, petitioners argue that the Corps' suspension of the Section 8(a) program, without notice and a hearing, unlawfully deprived them of property without due process of law. Pet. 36-37. As the court of appeals held, however, the Small Business Act and the applicable regulations vest the Small Business Administration and the procurement agency with absolute discretion to submit or withdraw a particular project from the program. Pet. App. A2-A3; 15 U.S.C. 637(a)(1)(A); 48 C.F.R. 19.800(c), 19.803(a)-(c), 19.804. Accordingly, petitioners did not have a property interest in the Section 8(a) program that was protected by the Due Process Clause. *Board of Regents* v. *Roth*, 408 U.S. 564, 577-578 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 93-2053

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ENPLANAR, INC., ET AL., PETITIONERS

VERSUS

TOGO WEST, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE BRIEF OF PETITIONERS

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RESPONSE TO "QUESTIONS PRESENTED"

1: The requested relief in the district court was not for an injunction directing the Army Corps of Engineers to award particular contracts to [petitioners] under Section 8(a) of the Small Business Act.(Opp. 7) Rather, injunctive relief was requested to restart the 8(a) program *and* to cause the two projects to be withdrawn from public procurement and replaced in the 8(a) program.(Pet. A-25).

2: "Whether the district court lacked jurisdiction over petitioners' claim against the Corps for an unspecified amount of monetary damages," fails to reveal that Keeler's initial monetary claim was alternative and made *before* the project was awarded, and that it would have been mooted by the declaratory and injunctive relief successfully opposed by Respondents. Moreover, the question is phrased as though a monetary damage remedy "*at law*" was requested. However, Keeler's residuary monetary claim is actually *equitable* in nature[1] and arose because the Corps withdrew the project for discriminatory reasons and subsequently (despite the filing of this suit) advertised and awarded the contract adversely.

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[1] "[T]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as money damages." *Dia Navigation Co., Ltd. v. Pomeroy*, 27 F.3d 918, 929 (3d Cir. 1994), quoting *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). "[A} monetary award can in some instances constitute equitable relief rather than money damages for purposes of § 702." [*Id.* at 930.]

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IN THE SUPREME COURT OF THE UNITED STATES
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VERSUS

TOGO WEST, SECRETARY OF THE ARMY,
ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE BRIEF OF PETITIONERS

RESPONSE TO BRIEF IN OPPOSITION

Serious questions of agency discrimination against minority business and conflicts among the courts of appeal concerning the jurisdiction over claims for redress are presented by this Petition. The importance of these issues is underlined by the serious lack of candor in Respondents' Opposition.

STATEMENT

1. Respondents imply that the challenge to the setaside program occurred in 1990 (Opp. 2).In reality the challenge began in 1981 or 1982 and resulted in *Valley Const. Co. v. Marsh*, 714 F.2d 26 (5th Cir. 1983). The opinion in *Fordice Const. Co. v. Marsh*, 773 F.Supp. 867, 869-70 (S.D.Miss. 1990) was rendered in March of 1990 and the judgment in

April, the same month as the beginning of the secret, adverse actions against the 8(a) contractors, *e.g.* the withdrawal of setaside of the Southeast Pass and the demand on the SBA for economic impact studies on projects including Keeler's Cotton Meade. By August, Cotton Meade was withdrawn on a false pretext and after the Corps' written threat to SBA to publicly procure it if the SBA did not cause an economic impact study to be made on this non-reoccurring project in violation of its own regulations.

Respondents claim that the Corps sought legal advice from Army Headquarters concerning the overall legality of the Section 8(a) program after the alleged November, 1990 challenge (Opp. 2). However, the actual suspension began in October, 1990 and the wrongful effects, as on Southwest Pass and Cotton Meade, began in April. Indeed, the suspension was a direct result of a decision by the government to abandon its appeal of *Fordice*.[1]

The admission (Opp. 2) that no new contracts were awarded during this period is an understatement. Beginning in April, 1990, the Corps began to withdraw projects from setaside and refused to include new projects for 8(a) procurement.

Respondents' claim (Opp. 2) that Army Headquarters gave the Corps advice in late January of 1994[2] that the 100% set aside was "erroneous" is untrue and unsupported in the record (Pet. at A-6).

While stating (Opp. 3) that Keeler sought damages from its failure to receive the Cotton Mead project, respondents fail to explain that the damage claim was an *alternative* plea, which

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[1] *See, e.g.*, Brief of Marsh, et al., appellees, to 5th Cir. (S.D. Miss)

[2] Should be 1991

only matured after the projects were adversely awarded timely despite requests for declaratory and injunctive relief.

Respondents aver (Opp. 3) that the district court's determination that "the Corps' resumption of its Section 8(a) program had mooted all claims for injunctive relief", but fail to state that this was held to be *erroneous* by the 5th Circuit (Pet. A-12). Similarly, their description of the first amended complaint against the Corps officials emphasizes the "unconstitutional retaliation" claims but does not mention other claims, such as those under the Equal Access to Justice Act, on account of the 8(a) program resumption, that were not properly subject to summary determination.

Although the court of appeal did not give effect to the normal consequences of the admitted lack of notice of summary judgment on the additional claims of the first amended complaint, it is clear that use of the supplemental memorandum as a summary judgment motion violated the district court's local rules (Pet. 7, n. 10) and did not provide the actual notice mandated by Rule 56(c). No motion for summary judgment was filed by the Corps contracting officers (Opp. 3). Only in the body of supplemental memorandum was the unconstitutional retaliation claim referenced. The *sotto voce* expansion of a summary judgment motion by means of a supplemental memorandum not so captioned violated the local rules of the district court. (Pet 7, n. 10) and the mandatory notice requirements of Rule 56(c). *National Fire Ins. v. Bartolazo*, 27 F.3d 518, 520 (11th Cir. 1994); *Missouri Pac. R. Co. v. Harrison-Fischer Mfg. Co.*, 26 F.3d 531, 539-40 (5th Cir. 1994); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994). "[A] district court may not grant summary judgment sua sponte unless the court gives notice and an opportunity to oppose summary judgment."

Respondents support the court of appeal's conclusion that the non-Keeler petitioners had failed to explain how discovery "would or could create a fact issue to overcome the . . . summary judgment motion." (Opp. 4, Pet. A-20.) Given the repeated Rule 56(f) motions and affidavits filed, it is clear that this threshold was unreasonably high, *Martel v. County of Los Angeles*, 21 F.3d 940, 945 (9th Cir. 1994), particularly since Keeler had demonstrated serious evidence of *discriminatory* intent sufficient to avoid summary judgment in Louisiana. *Resolution Trust Corp. v. North Bridge Associates, Inc.*, 22 F.3d 1198, 1207 (1st Cir. 1994); *St. Surin v. Virgin Islands Daily News*, 21 F.3d 1309, 1313 (3d Cir. 1994). This alone should have been enough to prevent summary judgment as to others similarly impacted who were prevented the same access to discovery. *Continental Ore. Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-699, 82 S.Ct. 1404, 1410-11 (1962); *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994). *Continental Ore*, *supra* at 1404, makes it clear that such rigid compartmentalization of evidence is inappropriate upon consideration of summary judgment. *Compare*, *Farmer v. Brennan*, No. 92-7247 (June 6, 1994) (remanding with instructions to reconsider the Rule 56(f) motion and requested discovery.)

Due to lack of Rule 56(c) notice in the district court, no hearsay objection was made to the document, not mentioned in depositions and first disclosed in the supplemental opposition, suggesting that the Corps contracting officers had relied on Corps instructions not to speak with petitioners. That this document was not provided in discovery would, if disclosed by a formal motion for summary judgment, have supported additional discovery under Rule 56(f), since its existence supports petitioners' contention that other important information in the possession of the government had been selectively produced or suppressed. *RTC*, 22 F.3d at 1205, 1205 ("Indeed, because the

government is rendered uniquely powerful by its vast resources and statutory authority, it has a special responsibility to abide by civil adjudicator rules. Here, RTC shirked this responsibility.), 1207 (facts needed to oppose summary judgment are in the government exclusive control); *Ethyl Corp. v. U.S.E.P.A.*, 25 F.3d 1241, 1246-47 (4th Cir. 1994).

2. Respondents' statement that "the district court . . . denied Keeler leave to file a second amended complaint seeking *injunctive* relief"[3] is also less than candid. There was no request for *injunctive* relief as to the two projects, since that relief had been made unavailable by respondents, but only *equitable* relief in the form of a substitute and restitutionary monetary award, *Bowen,* 487 U.S. at 900, and to prevent further occurrence of the same wrongful conduct. Moreover, the amended complaint asserted *Bivens* claims against individuals for suspending the 8(a) Program and discriminatorily withdrawing the Cotton Meade project and restated the APA discrimination claims.[4]

Respondents contend that § 702 did not provide jurisdiction because Keeler made no claim under the APA and because § 702 does not authorize monetary damages. In fact, the second amended complaint timely reinstated the APA claim and attendant jurisdiction. In addition, the statement that § 702 does not authorize monetary damages is not entirely correct. If money is sought to enforce a statutory mandate, it may be awarded as equitable relief. *Bowen,* 487 U.S. at 900. *Compare Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994); *Dia*, 27 F.3d 929-30.

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[3] Opp. at 6, emphasis added. 5th Cir. Record Excerpts 24-38.

[4] 5th Cir. Record Excerpts at 37 (*Bivens*), 32, 25, Count V, APA.

Although the 5th Circuit stated that the claims in Keeler's amended complaint were "nearly identical" to the claims unsuccessfully litigated in Louisiana, this amendment was, rather, an accurate forecast of what the 5th Circuit found to be lacking in the Louisiana pleadings, thus making it clear that these claims were proper in Mississippi. Although this result had been anticipated in the Second Amended Complaint filed in Mississippi, the district court, prior to 5th Circuit guidance and without analysis, refused to permit the filing of pleadings making claims in a manner which the 5th Circuit approved.

ARGUMENT

1. Respondents parrot the conclusion of the court of appeals that for petitioners to obtain an injunction against the Corps, "this order would also require injunctive relief concerning the SBA's conduct." However, SBA had already protested both the removal of the Cotton Meade and Southwest Pass projects as well as the attempt by the Corps to change the regulations to force SBA to provide economic impact statements on non-recurring projects. How can injunctive relief, which furthers stated SBA goals, be construed as adverse to the agency, since it was solely the Corps which had been secretly[5] revising regulations and withdrawing setaside projects for false and pretextual reasons?

The 5th Circuit's statement, "[I]f a court ordered the Corps to award these projects to specific 8(a) participants, this order would also require injunctive relief concerning the SBA's conduct as to its statutory duties regarding its selection of 8(a)

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[5] "[W]hen a proposed regulation of general applicability has a sustained impact on . . . an important class of the members or the products of that [regulated] industry, notice and opportunity for comment should first be provided." *Phillips Petroleum Co. v. Johnson* 22 F.3d 616, 620 (5th Cir. 1994).

contractors for a specific project, and its subsequent negotiations with a procurement agency concerning the terms of the project's contract"[6] is simply an *ipse dixit*. It lacks any explanation or justification of how such an injunction was actually against the SBA or would have affected the SBA.

Respondents assert that EJA was not entitled to injunctive relief because it "no longer exists, and therefore it cannot perform the contract." (Opp. 4, Pet. A-14, n. 7.) However, EJA existed at the time of the project award and could have performed the contract until the time it was performed by others. By this reasoning, if the contractor is put out of business by being unlawfully deprived of the contract, he has no recourse, whereas if he is *not* mortally injured he can qualify for relief.

Respondents' attempt to distinguish *Ulstein v. U.S.*, 833 F.2d 1052 (1st Cir. 1987) because those plaintiffs sought an injunction against the Navy rather than the SBA highlights a similarity rather than a difference and does not diminish that court's holding that Section 634 does not preclude an injunction against the SBA in all circumstances.

While injunctive relief may no longer be available, equitable relief is not moot, *Bowen*, 487 U.S. at 900, so that petitioners have "suffered some actual injury that can be redressed by a favorable judicial decision".

2. The alternative sources of district court jurisdiction against the respondent agencies are 5 U.S.C. § 702, 15 U.S.C. § 734(b), 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1988, and the general Congressional policy that agencies engaged in commerce can sue and be sued. *Ward*, 22 F.3d at 519-520; *F.D.I.C. v. Hulsey*, 22 F.3d 1472, 1480-81 (10th Cir. 1994). Petitioners

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[6] Petition at A-12, n. 5.

have also asserted *Bivens* claims against individual defendants for which there is admitted jurisdiction in the district courts.

Respondents' contention that the APA does not authorize a claim for monetary damages flies in the face of the principle that a monetary award can be appropriate equitable relief under 5 U.S.C. § 702. *Bowen,* 487 U.S. at 900. *Bowen* establishes that equitable relief may take the form of a money award, not just injunctive relief. The *Bowen* plaintiffs brought an equitable claim and were permitted a monetary award. *Bowen,* 487 U.S. at 900 (1988); *Dia*, 27 F.3d at 929-30, *Ward*, 22 F.3d at 519-20. The *Bowen* criteria, here met, is that the suit not seek money in compensation for damage sustained from the government action, and must be to enforce a statutory mandate itself, which happens to be for money payment. *Bowen,* 487 U.S. at 900. If the district court's orders are for specific relief rather than money damages, they are within its jurisdiction under 5 U.S.C. § 702's waiver of sovereign immunity. *Bowen,* 487 U.S. at 900. The "crucial distinction is whether the claimant is seeking funds to which a statute entitles it, rather than money for losses due to the [government] agency's failure to [take action]." *Bowen,* 487 U.S. 879. Petitioners do indeed seek money, the only alternative left, to enforce statutory mandates of the APA and the 8(a) program. *Compare*, *Loveladies Harbor, Inc. v. United* States, 27 F.3d 1545, 1550-55 (Fed. Cir. 1994) and *Charles v. Rice*, 28 F.3d 1312, 1321-22 (1st Cir. 1994). In *Bowen*, the remedy was ultimately monetary.

3. Respondents reiterate that no claim was made in the district court that hearsay was improperly relied upon in granting summary judgment, but again fail to concede that the inability to do so was on account of lack of valid 56(c) notice Their argument on the proposed amendment in Mississippi fails, as discussed above, because the relief there requested was not identical to that in Louisiana, but constituted compliance with the later decision of the 5th Circuit of procedural defi-

ciencies in the Louisiana complaint. In the absence of this guidance, the Mississippi district court could not exercise its discretion.

4. Respondents' contention of "absolute agency discretion" of the Corps is not supported by law. *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1450-51 (D.C. Cir. 1994); *Hulsey*, 22 F.3d at 1480; *U.S. Dept. Interior v. 16.03 Acres of Land*, 26 F.3d 349, 354 (2d Cir. 1994). Absent "absolute agency discretion," petitioners had property rights and standing to assert the deprivation of their legitimate claim to entitlement to the benefits of the 8(a) program free from secret, arbitrary, and discriminatory agency interference. *Board of Regents v. Roth*, 405 U.S. 564, 577 (1982); *Turpen v. City of Corvallis*, 26 F.3d 978, 979-980 (9th Cir. 1994) (entitlement to water service could only be secured by notice sufficient to seek pre-termination injunctive relief.)

CONCLUSION

Petitioners were the victims of an interagency dispute that caused the Corps to secretly modify its regulatory intent, attempt to bend the SBA to its new regulations by threats against the 8(a) contractors, suspend the 8(a) program, and withdraw setaside projects for false and pretextual reasons. When petitioners sought relief in the district court, they were denied injunctive relief because of their minority status and eventually dismissed in Louisiana without adequate discovery or trial. The one survivor, Keeler, whose case was not dismissed because of solid evidence of discrimination but transferred to Mississippi, found itself without a remedy because its right to the requested relief, award of the Cotton Meade project, had been rendered impossible because of adverse agency action. Dismissal, rather than even transfer to the Court of Federal Claims, was the unfortunate result.

Certiorari should be granted. The decisions below should be vacated and reversed and the cases remanded for full discovery and for trial.

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